Supreme Court, U.S.
FILED
94-31 JUL - 5 1994
OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BUD RIGGINS AND DONALD MCVEAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER BY ADOPTING A STANDARD FOR DETERMINING THE LEGAL SUFFICIENCY OF EVIDENCE UNDER WHICH ANY PROOF SUPPORTING ANY INFERENCE OF GUILT WAS SUFFICIENT AND IGNORING ANY REQUIREMENT THAT THE PROOF SUPPORTING GUILT BE SUBSTANTIAL, THE COURT OF APPEALS DENIED THE PETITIONERS THEIR RIGHT TO BE CONVICTED OF A CRIMINAL OFFENSE ONLY UPON PROOF BEYOND A REASONABLE DOUBT AS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?

II. WHETHER THE COURT OF APPEALS DENIED PETITIONERS THEIR RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITIUTION OF THE UNITED STATES BY ACCEPTING THE INFERENCES THAT SUPPORTED PROBABLE CAUSE TO OBTAIN A SEARCH WARRANT EQUALLY SUPPORTED A CONVICTION REQUIRING PROOF BEYOND A REASONABLE DOUBT?

III. WHETHER THE COURT OF APPEALS DEPRIVED THE PETITIONERS OF DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS IT PERTAINS TO APPEAL BY ADOPTING THE CITATIONS OF THE GOVERNMENT IN THE BRIEF OF THE APPELLANT, WITHOUT ANY CRITICAL REVIEW?

IV. WHETHER THIS COURT SHOULD INVOKE ITS SUPERVISORY POWERS TO REVERSE A CIRCUIT COURT THAT HAS BASED ITS DECISION ON THE CASES THAT HAVE BEEN ERRONEOUSLY CITED BY THE GOVERNMENT IN THE BRIEF OF APPELLANT?

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OPINION BELOW

The per curiam opinion of the United States Court of Appeals for the Sixth Circuit was entered on February 23, 1994, is unpublished and is included in the Appendix at 1a. Petitioners, Bud Riggins and Donald McVean, filed a joint petition for rehearing which was denied, without opinion, on April 6, 1994. The order denying rehearing is included in the Appendix at 46a.

The United States District Court for the Middle District of Tennessee orally granted petitioners' Motion for Judgment of Acquittal as to Courts 1, 2, and 5 on December 11, 1992. The transcript of the district court's oral finding is included in the Appendix at 29a. The district court's written Judgment of Acquittal as to Bud Riggins was prepared on December 29, 1992, and entered in the record on January 5, 1993, and is included in the Appendix at 20a. The district court's written judgment of acquittal as to Counts 1, 2, and 5 regarding Donald McVean is contained in the Judgment in a Criminal Case (Form AO 245 S) and was entered into the record on December 30, 1992. The Judgment pertaining to Donald McVean is included in the Appendix at 22a.

JURISDICTION

The Petitioner seeks review of the decision of the United States Court of Appeals for the Sixth Circuit entered on February 23, 1994. (Appendix 1a).

A joint petition for rehearing was timely filed in the Court of Appeals by petitioners. The petition for rehearing was denied by order entered April 6, 1994. (Appendix 46a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

CONSTITUTIONAL PROVISIONS

Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

RULES

Rule 29(c), Federal Rules of Criminal Procedure:

> (c) **Motion After Discharge of Jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

STATEMENT OF THE CASE

This petition involves a criminal case for which jurisdiction in the district court was invoked pursuant to 18 U.S.C. § 3231.

Petitioners were initially indicted in the Western District of Kentucky in this matter on July 2, 1991. A seven count Superseding Indictment was filed on March 2, 1992, charging the petitioners, Bud Riggins and Donald McVean, with conspiracy to manufacture 3, 4 - methylenedioxyamphetamine, in violation of 21 U.S.C. § 846; attempt to manufacture 3, 4 - methylenedioxyamphetamine in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2; carrying and using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c); possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and (2); and possession of triple neck round bottom flasks with intent to manufacture 3, 4 - methylenedioxyamphetamine in violation of 21 U.S.C. § 843(a)(6) and 18 U.S.C. § 2. Petitioner Bud Riggins was charged individually in Counts 6 and 7 with manufacturing marijuana and possession of marijuana with intent to distribute both in violation of 21 U.S.C. § 841(a)(1).

The trial of this matter commenced on September 8, 1992, and continued on September 9, 10, 11 and 15. At the close of the government's proof, the trial judge granted the petitioners' motion for judgment of acquittal on Count 3, which had alleged violation of 18 U.S.C. § 924(c), using or carrying a firearm during and in relation to a drug trafficking crime. On September 15, 1992, the jury returned verdicts finding both petitioners guilty of Counts 1, 2, and 5, conspiracy to manufacture, attempt to manufacture and possession of triple neck flasks with intent to manufacture 3, 4 - methylenedioxyamphetamine (MDA). Petitioner Donald McVean was found guilty of possession of a firearm by a convicted felon as charged in Count 4. The jury returned verdicts of not guilty on Count 4, possession of a firearm, and the marijuana charges, Counts 6 and 7, as to petitioner Bud Riggins.

Subsequently, both petitioners timely filed motions for judgment of acquittal regarding Counts 1, 2 and 5, demonstrating that in the instant case there was less evidence supporting guilt adduced at the trial than in any other case involving a clandestine drug lab in which the appellate courts had upheld the conviction against a challenge to the sufficiency of the evidence. At the December 11, 1992 hearing on defendant's motion, the trial court noted that this had been a troubling case and then granted the motions for judgment of acquittal. (Transcript of Proceedings December 11, 1992, Appendix 41a, 42a).

The United States filed notice of appeal, and by a per curiam opinion on February 23, 1994, the United States Court of Appeals for the Sixth Circuit reversed the decision of the trial court. (Appendix 1a). The United States filed a motion to publish the decision on the ground that the court of appeals had overruled a prior decision of the circuit and had applied the law to a novel set of facts. This motion was denied. The petitioners filed a joint petition for rehearing which was denied on April 6, 1994. (Appendix 46a).

Because the Sixth Circuit opinion is at variance with prior decisions of this Court and with other courts of appeal and

creates a standard for upholding jury verdicts of guilt in criminal cases that requires less than substantial evidence and fails to require proof beyond a reasonable doubt, Bud Riggins and Donald McVean now bring this matter to this Court by way of a petition for a writ of certiorari.

THE EVIDENCE

Bud Riggins had operated a crop dusting service out of his family's farm at 848 Riggins Road for approximately twenty-eight years, beginning in 1958. (Riggins at T.R. Vol. 5:63, 64). In approximately 1964, Riggins began to formulate his own pesticides and herbicides which were sold to farmers in Mississippi, Arkansas, West Tennessee, Southeast Missouri and Western Kentucky. (Riggins at T.R. Vol. 5:64, 66). By 1970, Riggins had stopped formulating pesticides and herbicides but occasionally sold small quantities of chemicals to others through Logan Ag Lab and Supply. By 1991, Riggins had decided to make a serious effort at selling chemicals to the water treatment and waste water industries as well as to increase his existing chemical sales business. Toward this end he began accumulating chemicals, developing a catalog and building a cement block chemical storage facility next to the airplane hangar on Riggins Road. (Riggins at T.R. Vol. 5: 77, 78, 80-82, 95, 96; Murrell Wix at T. R. Vol. 5: 58, 59; Gamble at T. R. Vol. 5; 18). In addition to chemicals Riggins sold glassware and other equipment. (Riggins at T.R. Vol 5:73).

Petitioner McVean had considerable computer training and when Riggins discussed with him the cost of commercially printing a catalog, McVean suggested that with a computer they could produce a quality catalog at less expense, including the cost of the hardware. Therefore in March 1991, Riggins purchased a computer and McVean was tasked with developing a catalog by indexing prices from several wholesale chemical distributors. (Riggins at T.R. Vol 5: 80-82; McVean at T. R. Vol. 5: 191-1950). Riggins also purchased an Ohaus GT 8000 scales, which had a computer link so that a chemical could be weighed and the computer would generate an invoice, a safety sheet and

a label. (Riggins at T.R. Vol. 5: 83, 84). In order to assess the market for water treatment and waste water facility chemicals Riggins sent out introductory letters and return cards to various public water and waste water authorities offering a free catalog. (Riggins at T.R. Vol. 5: 78). This was verified by a rebuttal witness for the prosecution, Johnna Joly (Sherrod), the superintendent of waste water treatment for Russellville, Kentucky. After being shown defense exhibits 17 and 18, the letter and return postcard Riggins sent Russellville, and being asked "Have you ever recalled seeing those documents before?" she stated, "Well, apparently so. But I don't remember it. I mean obviously because this is my handwriting [on the return postcard]." (Joly (Sherrod) at T.R. Vol. 6:49).[1]

The government's intervention in Riggins' chemical business began when the DEA office in Rochester, New York received a call from Eastman Kodak Fine Chemicals in early May 1991. Richard Hapeman, a representative of Eastman Kodak, testified to his knowledge of what constituted a suspicious order and the steps Eastman Kodak would take when a suspicious order was received. (Hapeman at T.R. Vol. 2:22). After reviewing the definition of a suspicious order that is listed in the Chemical Handlers Manual produced by the Drug Enforcement Administration, Hapeman testified that nothing in the instant case was suspicious except for the size of the isosafrole order. He noted that Riggins had requested that the order be shipped to a regular address, that he gave the name of his company, that the order was made on company stationery, that although he initially asked that it be sent COD, when he was told that was not acceptable, he readily agreed to comply with the requirements of Eastman Kodak to send a cashier's check. Hapeman indicated that to his knowledge there had been no misleading responses to the questions he asked. (Hapeman at T.R. Vol. 2: 44-46). He then indicated that because of the way the isosafrole molecules are put together, it is relatively easy to make it into something else,

[1] The transcipt volume for September 15, 1992, which is unnumbered will be designated Vol. 6.

therefore, it is a chemical that a hobbyist might use for experimentation. (Hapeman at T.R. Vol. 2: 48). He indicated that the 10 kilogram purchase of isosafrole from their company is not a standard order and that the standard size container in which they sell isosafrole is 1 kilogram. He indicated that the typical order was for perhaps 1 or 2 units at the 1 kilogram size. (Hapeman at T.R. Vol. 2:27). Hapeman advised that isosafrole generally is used as an intermediate or essential component in flavor and fragrance formulations. It is also used as an intermediate in pharmaceutical research. (Hapeman at T.R. Vol. 2: 27). With regard to the methanol which was the other chemical in Riggins' order, he indicated it is a very common chemical in both commercial and research applications and is often used as a solvent in the chemical laboratory. (Hapeman at T.R. Vol. 2:28). In fact, the DEA chemist, Odest Washington testified that methanol is such a common chemical it was irrelevant to any suspicious nature of the order. (Washington at T.R. Vol. 3: 47, 48). Methanol has never been on a DEA watch list of precursor or essential chemicals. (Hapeman at T.R. Vol 2: 39).

Hapeman testified that after receiving the order from Logan Ag Lab and Supply, since they had not dealt with that company before, they asked that the order be on business letterhead. They also asked for a statement that it not be used in a "residential setting" nor for food purposes. This statement was readily supplied. (Hapeman at T.R. Vol. 2:31, 32; government's exhibits 1 and 2). Hapeman described isosafrole as not flammable, and neither an acid or base but simply a particular combination of carbon, hydrogen and oxygen, that it is sold in glass bottles and routinely shipped by common carrier as there is no specific hazard identified with isosafrole. (Hapeman at T.R. Vol. II, 39-40).

Hapeman then testified that although isosafrole was neither on the precursor or essential chemical list when the transaction in this case took place, that in October, 1991, it was added to the listed chemicals. Even so, he indicated that being on the list merely set record keeping requirements and did not prevent the sale of the chemical. For

isosafrole the limit set, with regard to record keeping, is that a seller could sell up to 4 kilograms of isosafrole without keeping any record that would be available to the DEA. He further agreed that a secondary sales source, such as Mr. Riggins and Logan Ag Lab could purchase the 10 kilograms from Kodak who would then be required to record that sale, but the intermediary could sell it in less than 4 kilogram quantities without having to record the sale. (Hapeman at T.R. Vol. 2: 42-43). Hapeman agreed there are quite a few small supply companies selling research chemicals and that the number of smaller companies has increased with the increase in federal regulations for testing water purity, waste water control, etc. (Hapeman at T.R. Vol. 2: 43-44).

Gary Tennant had been employed by the Drug Enforcement Administration for approximately three years. (Tennant at T.R. Vol. 2: 49). Sometime around May 15, 1991, he and agentFitzgerald, who had been with the DEA seven years, received a call from agent Matt Barnes in their Rochester, New York office concerning information given to Barnes by Eastman Kodak regarding the order for isosafrole and methanol by Logan Ag Lab and Supply. (Tennant at T.R. Vol. 2: 50; Fitzgerald at T.R. Vol. 2: 100).[2] Tennant and Fitzgerald then decided to do a controlled delivery on the package, and after having a tracking device placed in the isosafrole package, arranged for delivery of the package by Overnite Express on June 10, 1991. Tennant also indicated that he was unable to find the phone number for Bud Riggins in the local phone book in Adairville, Kentucky. However, he did reach Logan Ag Lab and Supply at the number provided by Riggins to Eastman Kodak. (Tennant at T.R. Vol. 2: 53-54).

Once they arrived at the farm; an individual was at the airplane hangar, who they later determined was Clarence

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[2] Although the agents based importance on the methanol, the DEA chemist testified that the methanol was irrelevant and the isosafrole alone would not trigger a determination of probable cause. (Washington at T.R. Vol. 3:50).

Gamble. Tennant noted that when he asked Gamble to sign the company's name, Gamble was not sure what to do. Tennant then pointed to the name Logan Ag Lab and Supply at the top of the receipt and indicated to Gamble that he should sign that name.[3] (Tennant at T.R. Vol. 2: 56). Tennant based his assumption, used to obtain a search warrant, that the hangar was a clandestine lab by observing that when he walked into the hangar, he smelled the distinct smell of acetic anhydride.[4] (Tennant at T.R. Vol. 2: 57). The government's chemist, Odest Washington, testified that the chemicals in the hangar were in a sealed condition and it would be doubtful that they could have been smelled, especially since the hangar was ell ventilated and he did not recall a strong chemical smell when he entered the hangar. (Washington at T.R. Vol. 3: 82, 83).

Tennant described the area around the hangar and the farm as "a very desolate area." (Tennant at T.R. Vol. 2: 58). The DEA failed to do a thorough investigation before the search and failed to adequately investigate during the search. Tennant testified that his investigation did not include inquiring concerning the telephone conversations that Riggins had with Eastman Kodak and he was not aware that Eastman Kodak had called Riggins on the telephone. (Tennant at T.R. Vol. 2: 72, 73). Moreover, Tennant indicated he had learned from Clarence Gamble that he had

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[3] Although the government has made much of Gamble not knowing the name of the company, or not immediately knowing what he should write down, it became clear throughout the other testimony in the trial, including that by Gamble, that he did not work for Logan Ag Lab and Supply, but rather worked for Riggins as a farm-hand. Moreover, Gamble testified that he had not been told to go to the hangar by anyone at that point to meet the Overnite truck, but simply happened to be there at the time. Therefore, there would be nothing unusual about the farm-hand being confused about what name to put on the receipt when told simply to sign "the company's name." (Gamble at T.R. Vol. 5: 21, 22, 29, 30).

[4] The later testimony made clear that acidic anhydride is not used in any fashion in the formulation of MDA and it also became clear that there never was a laboratory of any sort at or anywhere near the hangar.

worked for Riggins as an employee for approximately three years but, he never inquired further of the nature of Gamble's employment with Riggins and had no idea whether he worked for Riggins as a farm-hand or if he worked for Logan Ag Lab & Supply.[5] (Tennant at T.R. Vol. 2: 72-73). In describing his visual search of the hangar area, he indicated he did not notice whether the doors of the hangar could be closed or not and did not notice whether there were any holes in the roof of the hangar.[6]

On June 11, 1991, the DEA, accompanied by state and local police, searched the airplane hangar and then the house in which the chemicals were being stored. Other than the controlled delivery of the isosafrole and methanol, none of the agencies involved had conducted any surveillance of the site other than an attempt to monitor the transmitter in the isosafrole container, and there were no intercepted phone calls, informants or other cooperating alleged conspirators. The DEA's only information was the order of isosafrole and methanol from Kodak and knowledge of Riggins prior criminal record. They did not even know of McVean's existence. (Tennant at T.R. Vol. 2: 76, 77).

The first area searched was the airplane hangar which Agent Fitzgerald described as being open with one of the doors falling off and having a smell like acidic anhydride or similar to agricultural chemicals. (Fitzgerald at T.R. Vol. 2: 128-130). The acidic anhydride found in the hangar was in a sealed container and, with the open air ventilation of the hangar, would not have been capable of being smelled. The DEA chemist testified that the smell in the hangar was "not pronounced." (Fitzgerald at T.R. Vol. 2: 126; Washington at T.R. Vol. 3: 82-83). The DEA chemist tes-

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[5] Tennant further testified that at the time of the search they had no evidence that Bud Riggins had been selling MDA or any other controlled substance and they were not aware of the existence of Don McVean until the day they executed the search warrant. (Tennant at T.R. Vol. II, 76-77).

[6] In fact, the hangar doors were falling off. (Fitzgerald at T.R. Vol. 2: 127, 128; defense exhibits 1 and 2).

tified that they found acetic anhydride and hydrobromic acid in the hangar, both in a sealed condition. (Washington at T.R. Vol. 3:82). Neither was included in the synthesis route used to make MDA from isosafrole. (Washington at T.R. Vol. 3:62).

Outside the hangar, the agents searched Riggins' pick-up truck and found a small book entitled, *Drug manufacturing for Fun and Profit*. Agent Fitzgerald testified that there were no chemicals found in the search that were consistent with anything in the book and that there was nothing in the book that would assist in the manufacturing of MDA.[7] (Fitzgerald at T.R. Vol. 2:124).

After searching the hangar the agents obtained a state search warrant to search the house to which Riggins indicated he had taken the isosafrole. While the agents went to obtain the warrant, state troopers were assigned to watch the house. During this period, McVean came out and talked to the troopers and then was allowed to reenter the house where he stayed at least 30 to 40 minutes before the agents arrived with the warrant. (Tennant at T.R. Vol. 2:58, 60, 61). Tennant then related that when they entered the house, McVean entered first, crossed the room, sat down and lit a cigarette. This contradicted Tennant's testimony that upon entering he smelled a heavy concentration of ether, a highly explosive solvent, which causes nausea, headaches, etc. It is relevant that there were no reported incidents of such side effects and not only did McVean's lighting his cigarette not explode the house but neither did the computer running in the other room. (Tennant at T.R. Vol. 2:63, 86-89, 91, 92). Once inside the house in which the chemicals were stored the agents found letterhead for Logan Ag Lab and Supply which also listed the correct phone number and

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[7] The government attempts to stretch the point by suggesting that the book explains how to make DMT which is manufactured in a process similar to that used for MDA (Brief of Appellant at 8); however the only similarity is they both are made by chemical synthesis although using different chemicals and different procedures which is the equivalent of saying baking a cake is similar to making fudge.

address. Moreover, the computer was in the process of printing the catalog and the agents seized letters to and from several chemical companies. (Fitzgerald at T.R. Vol. 2:109-110, 193-141; government's exhibit 18).

The chemicals and equipment found during the search were as follows: A. In attic behind a single sheet of plywood; (1) hydrochloric acid, (2) potassium dichromate, (3) ethyl alcohol, (4) acetic acid, (5) ethyl acetate, (6) formamide, (7) dimethylmalonate, (8) phenylacetaldehyde, (9) bromoethyl benzene, (10) N-butyl chloride, (11) nitric acid, (12) titrant standard potassium hydroxide alcoholic, (13) magnesium metal, (14) potassium permangante, (15) pyridine, (16) phenylacetyl, (17) toluidine, (18) acetylacetone, (19) carbon tetracholride, (20) phenylacentonitrile, (21) methyl iodine, (22) chromiuim trioxide, (23) an unknown liquid that was never analyzed; B. In living room; (1) isosafrole, (2) methanol, (3) ethyl alcohol, (4) sulfuric acid, (5) hydrogen peroxide 30%, (6) ethyl ether, (7) aluminum activated, (8) toluene, (9) formic acid 88%, (10) aluminum metal, (11) isopropyl 70%, (12) isatoic anhydride, (13) muriatic acid, (14) chromium trioxide, (15) sodium acetate, (16) three, 3000 ml single neck flasks, (17) one, 1000 ml single neck flask, (18) a hotplate; C. found in kitchen; (1) acetone,[8] (2) inositol, (3) phosphoric acid, (4) raney-nickel, (5) chromium tricxide, (6) empty gelatin capsules,[9] (7) two scientific scales, (8) two laboratory thermometers; D. Found in dining room (1) a tannish liquid in a milk jug (Fitzgerald) or a container marked pump oil (Washington) that turned out to be phenyl 2 propanol. (Fitzgerald at T.R. Vol. 2: 116-119, 132, 134, 136, 153); Washington

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[8] The acetone can was of a hardware rather than chemical grade,none of the agents knew whether or not the can was empty and it was not listed on the DEA form 12. (Fitzgerald at T.R. Vol. 2: 137; Washington at T.R. Vol. 4:14-15; Exhibit 6).

[9] The gelatin capsules were used and the agents assumed that the Defendants had emptied them in order to refill them with MDA, after throwing away the initial contents. (Fitzgerald at T.R. Vol. 2:135). The defense produced proof that new, unused capsules can be inexpensively purchased at health food stores. (Huber at T.R. Vol. 5:168-169).

at T.R. Vol. 3:40-43; Government's Exhibit 19, Defendants' Exhibit 6).

During the course of the search, they found no illegal or controlled chemicals or substances. (Fitzgerald at T.R. Vol. 2, 150, 154). Although there was an attempt to conceal the chemicals and glassware in the attic that was accessible from the open garage, there was no attempt to conceal the chemicals that were located in the house. (Fitzgerald at T.R. Vol. 2: 151). Inositol powder is simply a B vitamin and was in plain view on a shelf with other vitamins. (Fitzgerald at T.R. Vol. 2: 153). With regard to the gelatin tablets, Fitzgerald testified there was no way to know how long they had been there or how old the tablets were, that it could be months or years. (Fitzgerald at T.R. Vol. 2: 157). Finally, he testified that there were no recipes or formulas for MDA or any other illegal drug found during the search. (Fitzgerald at T.R. Vol. 2: 158).

Odest Washington, the government's chemist, testified that he was a chemist with the DEA working at the North Central Lab in Chicago, Illinois. He has been so employed for approximately eighteen (18) years as a forensic chemist and holds a Bachelor of Science degree in Chemistry from the University of Arkansas at Pine Bluff. (Washington at T.R. Vol. 3: 5,7). Odest Washington testified about the chemicals that were taken for examination in his lab. Of all the chemicals present, the only chemicals taken to the lab were those represented by Government's Exhibits 6A-K. These included hydrogen peroxide, 1 phenyl 2 propanol, formic acid, formamide, sodium acetate, isosafrole, Exhibit 6K (which tested to reveal no controlled substance but merely empty capsules), 6J which was isonitrosopropiophenone, acetic anhydride and hydrobromic acid. (Washington at T.R. Vol. 3: 34,36). Of all these samples tested only two, the isonitrosopropiophenone and the 1 phenyl 2 propanol, were in incorrectly or non-labeled containers. (Washington at T.R. Vol. 3:36). Washington then testified that the 1 phenyl 2 propanol can be used as a precursor for some illegal substances, but not MDA, however, he also

believed that it could be bought commercially.[10] (Washington at T.R. Vol. 3: 60, 61). Washington then described the following as the chemicals found in the search that can be used for making MDA as: isosafrole, formamide, formic acid, sulfuric acid, hydrochloric acid, hydrogen peroxide, toluidine, benzene, carbon tetrachloride, and acetone. (Washington at T.R. Vol. 3: 40, 41). Washington then testified that if you did not have the proper equipment to do the synthesis then the reaction could get too hot and could occur too fast and thus splatter or explode. (Washington at T.R. Vol. 3: 43). He also testified a synthesis of MDA beginning with isosafrole would take anywhere from thirty-six to forty-eight hours. Moreover, he valued the chemicals and glassware and other apparatus found at the Riggins farm to be $20,000.[11] (Washington a T.R. Vol. 3: 43).

Washington further testified that isosafrol was primarily used as a flavoring for root beer and sarsaparilla and also as a fragrance for making toiletries. He agreed isosafrol had many legitimate purposes and that he would not be surprised if it was used in pesticides. (Washington at T.R. Vol. 3: 51, 52; Vol. 4: 17).[12] Further, Washington did not dispute that a chemical hobbyist might use the chemicals present to make legal products.(Washington at T.R. Vol. 3: 61).

In discussing the manufacture of MDA using the synthesis route that used isosafrole, Washington testified that you would use triple neck flasks and also a heating mantle with a rheostat. The flask would be put in the heating

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[10] Dr. Tom Green, a professor of chemistry at Western Kentucky University, and Neal Davis, an employee of a chemical distributor, testified that 1 phenyl 2 propanol and isonitrosopropiophenone are commercially available. (Green at T.R. Vol. 4: 132, 133; Davis at T.R. Vol. 4: 181).

[11] The government's theory that the petitioners were intending to make MDA presupposes that someone would buy over $20,000 worth of chemicals and equipment and not obtain the correct equipment or the correct chemicals.

[12] Dr. Green testified that isosafrole is used to make pesticides more potent. (Green at T.R. Vol. 4: 127, 128).

mantle and the rheostat set to control the temperature of 190 degrees centigrade for five hours. He advised that the rheostat is a separate instrument from the mantle itself and that it is plugged into the mantle. He noted that there was no rheostat found in the search of the Riggins farm. He also noted that using a condenser alone attached to the triple neck flask would not be able to maintain the 190 degrees centigrade (which Washington described as approximately twice the boiling point of water) temperature very accurately. (Washington at T.R. Vol. 3: 65-67, 75-77). Moreover, he noted that you would use a ring stand to attach the various equipment to hold it in place while the synthesis was taking place. (Washington at T.R. Vol. 3: 70). During the search of the Riggins house they did not find any ring stands, clamps, or any other apparatus designed to hold the equipment during synthesis. (Washington at T.R. Vol. 3: 71).

Washington then discussed the contents of the DEA Form 12 which was the inventory list in the search. He indicated that he had primarily been responsible for completing the Form 12 and that it is the primary document that establishes the existence or lack of existence of items at the search sight. He noted that DEA 12 listed only one heating mantle found in the attic and that this mantie was listed as a 100 millimeter heating mantle. He however suggested that he believed it was actually a 1,000 millimeter heating mantle. He also indicated they found another heating mantle in a downstairs closet that although it was not listed in the DEA 12 he did recall it being photographed in the video-tape that was entered as Government's Exhibit 4 and that that mantle was also a 1,000 millimeter mantle and therefore it would fit triple neck flasks or other round bottom flasks that were 1,000 millimeters or smaller and that it would not fit 3,000 or 5,000 millimeter flasks. (Washington at T.R. Vol. 3: 73,74).

Of over forty different chemicals, not counting pesticides and other agricultural chemicals located in the search sight, Washington took only ten for testing. (Washington at T.R. Vol. 3: 80,81). Washington again affirmed that only eight

(seven if the acetone can was empty) of the forty plus chemicals present were consistent with the synthesis route that created the DEA's presumption that MDA was going to be made in this case. (Washington at T.R. Vol. 3: 81).

Washington noted that the last step of the procedure in making MDA was to make the solution alkaline. He indicated that that meant to make it basic. He agreed that up to that point you had been making the solution with acids and that therefore the solution had an acetic quality. He testified that the only chemical available that could potentially be used to make the compound alkaline was the titrant standard potassium hydroxide alcoholic.[13] He also indicated that it was not necessary to make the solution alkaline, as prior to adding a base you had MDA but adding the base was necessary to make the crystaline powder. (Washington at T.R. Vol. 3: 90,91). He agreed that if you had the crude form of MDA it could not be placed in capsules and therefore was inconsistent with the capsules found on the sight. (Washington at T.R. Vol. 3: 93). DEA is aware of four synthesis routes to make MDA but only one can be used with isosafrole. Since seven or eight of the chemicals found were consistent with this route, Washington made the assumption that if the petitioners were going to make an illegal drug it would be MDA. However, the search found no recipes for MDA. (Washington at T.R. Vol. 3: 94,95).

After reviewing the uses of the various chemicals found, Washington, in summary, stated "See all these other chemicals can have other uses, and all I was saying is that these chemicals, these seven or eight chemicals we found, would be seven or eight out of the thirty or forty, whatever, you can make MDA. That's all I'm saying." He also noted that most chemical retailers would probably carry the same

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[13] When Washington was questioned as to his not taking a sample of the titrant standard to check its PH, since it was such a critical component, he responded that his role was to show that MDA could be made, not that it was being made. Dr. Green testified that titrant standard potassium hydroxide alcoholic came in only very low PH formulas and therefore was not suited for changing the acidic solution to an akaline solution. (Washington at T.R. Vol. 4:11, 12).

chemicals that were found in the search. (Washington at T.R. Vol. 3: 100). With regard to the acetone, Washington testified that he did not know whether or not the can found in the kitchen was empty and further he did agree that acetone was simply a type of solvent and that it was used like a paint thinner and fingernail polish remover. He acknowledged that the acetone had not been listed on the inventory sheet, the DEA 12. (Washington at T.R. Vol. 4: 14, 15; Defendant's Exhibit 6). When reviewing the synthesis process described in the DEA handbook for agents and chemists Washington agreed that there was a need for chilled acetone in the formula and that there was not any acetone unless there was hardware grade acetone in the can found in the kitchen. (Washington at T.R. Vol. 4: 17, 18). He further observed that the typical way that you would mix the solution would be by using a magnetic stirrer. No such stirrer was found in the search of the Riggins house. (Washington at T.R. Vol. 4: 18, 19). Washington also noted that part of the formula called for heating the solution on a steam bath for three hours but no steam bath was located on the Riggins farm. (Washington at T.R. Vol. 4: 19, 21).

REASONS FOR GRANTING THE WRIT

A. OVERVIEW

The United States Court of Appeals for the Sixth Circuit, in reversing the district court's decision to grant a judgment of acquittal as to Counts 1, 2, and 5 of the indictment in this matter has followed a standard for upholding the verdict of a jury which required neither proof beyond a reasonable doubt nor substantial evidence to support the conviction. In so doing, the court below has rendered an opinion which has decided a federal question in a way that conflicts with prior decisions of this Court, and is at odds with the standard used for evaluating challenges to the sufficiency of the evidence in other circuits. Moreover, the Sixth Circuit has justified its decision in this matter by misciting numerous cases and thus has departed from the

accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory jurisdiction.

As set forth below, the errors committed by the court of appeals in the instant case violate substantive constitutional rights of the petitioners, and the miscitation of authority deprived Riggins and McVean of a fair decision based upon the facts and legal precedent.

B. THE COURT OF APPEALS BY NOT REQUIRING THAT THE JURY'S DECISION BE SUPPORTED BY SUBSTANTIAL EVIDENCE DENIED THE PETITIONERS THEIR RIGHT TO BE CONVICTED OF A CRIMINAL OFFENSE ONLY UPON PROOF BEYOND A REASONABLE DOUBT AS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court in *Glasser v United States*, 315 U.S. 60, 80 (1942), set forth the standard for reviewing the sufficiency of the evidence in a criminal case in the federal courts as:

> It is not for us to weigh the evidence or determine the credibility of witnesses. The verdict of a jury must be sustained if there is *substantial evidence* taking the view most favorable to the Government, to support it. (emphasis added).

This standard was reiterated by this Court in *Jackson v Virginia*, 443 U.S. 307, 316-319 (1979). The "substantial evidence" requirement of *Glasser* is a structural underpinning of the requirement that the government must prove every element of the offense beyond a reasonable doubt as set forth in *In re Winship*, 379 U.S. 358 (1970). As explained in *Jackson*, in which the Court was reviewing a state court decision and therefore in which greater deference was due to the decision of the lower court than in the instant case:

> The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A "reasonable doubt," at a minimum,

> is one based upon "reason." Yet a properly instructed jury may occassionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. . . . In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction.
>
> A federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained by a state court.
>
> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.

443 U.S. at 316-318. The *Jackson* court continued by making clear that the "no evidence standard" of *Thompson v. Louisville*, 362 U.S. 199, was "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt." As the Court explained,

> "[A] mere modicum of evidence may satisfy a 'no evidence' standard. . . . *Jacobellis v. Ohio*, 378 U.S. 184 (Warren, C.J., dissenting)." Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, . . . could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt."

443 U.S. at 320. Yet, despite this clear necessity from *Glasser* and *Jackson* the Sixth Circuit, as will be further set forth ante, has removed the requirement of proof beyond a reasonable doubt as mandated by the due process clause and replaced it with an "any evidence" standard.

Contrary to the clear pronouncements of this Court regarding the standard of review when considering a motion for judgment of acquittal, the court of appeals below never

once mentioned the need for "substantial evidence". (opinion of the 6th Circuit, at l3, l4; Appendix 14a, 15a). Moreover, the court below, while properly finding that a verdict of guilty could be supported solely by circumstantial evidence, and that the circumstantial evidence need not remove *every* reasonable hypothesis except that of guilt, diluted the standard of evidence in a criminal case required by *Winship* when it overruled its previous decision in *United States v Leon*, 584 F.2d 667 (6th Cir l976). (Opinion of the Sixth Circuit at l3, l4 n.l9; Appendix 15a).

Leon had held that "where the evidence as to an element of a crime is equally consistent with a theory of innocence as with a theory of guilt, the evidence necessarily fails to establish guilt beyond a reasonable doubt." 514 F.2d at 677. In overuling *Leon* the court below failed to recognize the distinction between evidence that equally supports guilt and innocence, and evidence that does not remove every reasonable hypothesis except that of guilt. It is beyond question, that if the evidence weighs equally towards guilt and innocence it simply cannot rise to the level of proof beyond a reasonable doubt; whereas, there can certainly remain a reasonable hypothesis supporting a conclusion other than guilt even when the evidence is overwhelmingly in favor of guilt. Stating the rule as, that it is not necessary that circumstantial evidence remove every reasonable hypothesis except that of guilt is simply to give due credit to a jury verdict wherein a rational trier of fact has found proof beyond a reasonable doubt from substantial evidence. However, to suggest that evidence that equally supports guilt and innocence is sufficient to sustain a jury verdict against the defendant denies the defendant the right to be proven guilty beyond a reasonable doubt, and removes from the government its constitutionally required burden of proof.

A review of the applicable Sixth Circuit precedent demonstrates that there has been a dangerous and precipitous slide in due process protection regarding review for the sufficiency of the evidence between the circuit's decision in *Leon* in l976 and the present. One year after *Leon*, the circuit court noted in *United States v Green* that "substan-

tial evidence is more than a scintilla. . . It is evidence supporting a substantial basis of fact from which the fact in issue can be reasonably inferred." 548 F.2d 1261, 1266 (6th Cir. 1977). More recently, the court noted in *United States v Stone* , that the verdict must be "supported by substantial and competent evidence upon the record as a whole." 748 F.2d 361, 363 (6th Cir. 1984). However, by the Sixth Circuit's decision in *United States v Davis*, it was only in dissent that it was observed that "circumstantial evidence may be used to establish a defendant's intent, but 'such inferential analysis is not boundless. . . .'" 981 F.2d 906, 912 (6th Cir. 1992) (Suhrheinrich dissenting).

Finally, in the instant decision of the court below, the need for determination as to whether there are reasonable inferences and whether there is substantial evidence completely vanished to the extent that the court formally overruled *Leon*. (Opinion of the Sixth Circuit at 13 n.19; Appendix 15a n.19). The court below in its enthusiastic embrace of the boiler plate rules for reviewing for the sufficiency of evidence, that the court must view the evidence in the light most favorable to the government, loses sight of the ultimate requirement of due process that the burden of proof remains on the government and the evidence must be substantial. It is this lip service acceptance of the boiler plate requirements, without honoring their substance that is particularly insidious about the opinion below. If the Sixth Circuit's failure to honor the substantial evidence requirement is not reversed, it surely will lead to the extension of the weakening of the reasonable doubt standard in criminal cases.

Moreover, the Sixth Circuit is not alone in the dilution of the protection guaranteed by the due process clause of the Fifth Amendment as applied to defendants convicted by errant jury consideration. The Seventh Circuit in *United States v Jackson*, while endorsing the standard that the reviewing court must affirm "as long as 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' " crossed the constitutional boundry of the reasonable doubt standard by stating "we

must affirm unless the record is barren of any evidence, regardless of weight, from which the trier of fact could find guilt beyond a reasonable doubt. 935 F. 2d 832, 840 (7th Cir. 1991) (quoting *United States v Atterson*, 926 F. 2d 649, 655 (7th Cir. 1991)).

However, several circuits have maintained the substantial evidence standard required to uphold a jury verdict of guilt under an attack based upon sufficiency of the evidence. The Third Circuit in *United States v Brown*, setting forth a standard by which they would ultimately reverse the conviction of one defendant, noted that while considering the evidence in the light most favorable to the government, they could only affirm if there was "substantial evidence from which any rational trier of fact could find guilt beyond a reasonable doubt." 3 F.3d 673, 687 (3rd Cir. 1993)(citing, *Glasser v United States*). In his separate opinion, concurring in part and dissenting in part, Chief Judge Politz in *United States v Brechtel* reiterated the Fifth Circuit's understanding of the appropriate standard for evaluating a challenge to a jury verdict based upon the sufficiency of the evidence as:

> In order to sustain a conviction the evidence need not eliminate all hypotheses of innocence. Our precedents, however, make equally clear that mere consistency with a theory of guilt will not suffice. Rather, where the evidence viewed most favorably to the government provides equal or near equal support to inferences of guilt and innocence, a rational jury necessarily must entertain a reasonable doubt.

997 F.2d 1108, 1130 (5th Cir. 1993). Thus, at least according to its Chief Judge, the Fifth Circuit defines the proposition set forth in the now overruled *United States v Leon* to be the appropriate analysis by which to judge the sufficiency of the evidence in a criminal case.

In fact, to suggest other than that evidence which equally supports guilt and innocence fails to establish proof beyond a reasonable doubt is to deny the reasonable doubt standard itself and convert it to a probable cause standard as was

done in the case at bar. As evidenced by the decision in the instant case, as further elaborated below, the standard set out by the Sixth and Seventh Circuits, by ignoring the *Glasser* substantial evidence requirement and, as phrased by the Seventh Circuit, by affirming the jury verdict unless the record is "barren of any evidence, regardless of weight," allows conviction when there is but a scintilla of evidence.

C. THE COURT OF APPEALS, BY ACCEPTING THE PROPOSITION THAT ANY INFERENCE, NO MATTER HOW SLIGHT THAT SUPPORTS THE JURY'S VERDICT IS SUFFICIENT TO PROTECT THE VERDICT FROM A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE, DEPRIVED THE PETITIONERS OF THEIR RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

As stated above, the Court in *Glasser v. United States*, set forth the requirement that to sustain a jury verdict over a challenge based upon the sufficiency of the evidence the court must find that the verdict was supported by "substantial evidence." 315 U.S. at 80. In *Jackson v Virginia*, this court defined the relevant standard as whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319. By creating this "substantial evidence" or "rational trier of fact" standard, this Court established that as a matter of law a jury verdict could not be sustained even though there may be some evidence to support the jury's decision unless that evidence reached the level of being substantial which has been often defined as "more than a scintilla." *See, Richardson v Perales*, 402 U.S. 389, 401(1971) (describing substantial evidence for the purpose of social security claims under 42 U.S.C. § 405(g) as "more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") Therefore, in order to determine whether or not as a matter of law the evidence reaches the level of "substantial" the court reviewing the jury verdict, whether it be the trial court or an appellate court, must be in a position to evaluate

the significance and sufficiency of the inferences drawn from the evidence. In the instant case, this is the evaluation that the district court undertook and which the appellate court rejected.

In reaching its conclusion, the circuit court sets forth a litany of inferences which it indicates will support the jury's verdict. Petitioners contend that these inferences are insufficient and in addition, as will be discussed below, the cited authority for the meaning of the inferences is inaccurate and misleading.

The first example of that evidence that the court below declares to be the "most 'damning'" to the petitioners was the "concealment of chemicals and supplies behind a sheet of plywood in Riggins' attic." Although the hiding in this case may raise some inference, it must be taken in light of the remainder of the evidence. The remaining evidence in this case was that there was no door on the garage, and thus, no way to lock the attic or its pull-down stairway. Therefore, it was prudent to block the view from the entryway to the attic space to the storage area where the chemicals were kept to prevent random intruders and curious trespassers from seeing the chemicals. Moreover, there was substantial, non-contested evidence, most of which was produced by the prosecution, that the chemicals that were stored in the hanger were not in any way concealed, that they were visible from the hanger entry which was not capable of being closed, and the chemicals and other supplies that were in the house were visible when viewed through the windows of the house. Therefore, the concealing in this case was not the type of concealing that the court in *United States v Wagner*, 884 F.2d 1090 (8th Cir. 1989), upon whose authority the court below relies, found to create an inference of guilt. In *Wagner* the defendant had used an alias to obtain the chemicals and glassware, and had removed labels and repackaged chemicals. 884 F.2d at 1094. None of this evidence of hiding or disguising was present in the instant case. Therefore, the inference created in the instant case by what the court below has characterized as "hiding" is insignificant when compared to the

inference created in *Wagner* by the intentional disguising, repackaging and use of an alias.

In addition, the court of appeals relies on the suggestion that the defendants collected nearly all of the chemicals essential to the manufacture of MDA. The value of this inference must also be qualified by the facts of the instant case. In the instant case, the government agents had inventoried forty-one chemicals - at least thirty-four of which were inconsistent with manufacturing MDA. In addition, the government failed to make specific reference to some of the chemicals present, classifying them only as ordinary farm chemicals. Therefore, one has to question the weight of the inference that can be drawn by the fact that the petitioners purchased seven chemicals that were consistent with manufacturing MDA according to the route suggested by the government, especially in light of the testimony of the government's chemist that the same chemicals were capable of manufacturing literally hundreds of thousands of additional products and compounds.

The court below cited *United States v. Packer*, 730 F.2d 1151 (8th Cir. 1984) to support the theory that the purchase of nearly all the necessary chemicals to manufacture an illegal drug created an inference of guilt. (Opinion of the Sixth Circuit at 15; Appendix 16a). Yet in *Packer*, the court utilized the purchase of the chemicals as sufficient to draw an inference to create probable cause for a search. In so doing, the court noted that there was a "strong preference for searches made pursuant to a warrant" and thus the need for common sense review with deference to a decision of the issuing magistrate. *Packer* at 730 F. 2d 155. The salient lesson from the decision in *Packer* is therefore that although the purchase of the chemicals may create some inference it is a rather insubstantial one, as the court saw the need to give due deference to the findings of the magistrate to support the spirit of requiring a search warrant in order to prevent law enforcement agents from searching on their own assumption of probable cause.

Therefore it is appropriate in the instant case for the reviewing court to analyze the value that a rational juror

could reasonably attach to each of the inferences premissably drawn. The court below also saw an inference in the fact that the defendants had purchased chemicals in an amount inconsistent with personal use, citing *United States v Monroe*, 866 F. 2d 1357 (11th Cir. 1989). This inference also must be tempered by the specific facts available in *Monroe* that were absent in the present case. In *Monroe* the defendant had purchased fifty-five gallons on methylamine[14] and the court never analyses the role this purchase plays in its decision. Instead, the *Monroe* court emphasizes that there was a formula for methamphetimine found during the search on which there were notes in the defendant's handwriting, the lab apparatus was set up and there had been statements made to a third party by a co-conspirator that the co-conspirator and Monroe were going to make methamphetimine. By contrast, in the case at bar, there was a large amount of isosafrole purchased, however, there were insufficient quantities of other chemicals to mix with the isosafrole assuming that one was going to make MDA, and there was no other evidence in terms of co-conspirator statements, formulas, etc. suggesting intent to manufacture MDA. Thus once again, the reviewing court must evaluate the strength of this inference.

A similar analysis applies to the other inferences that were drawn by the court of appeals. For example, the court draws an inference from the purchase of expensive equipment capable of being utilized in the drug manufacturing process. However, in this instance, the pieces of equipment purchased by the petitioners were inconsistent with each other. The proof showed that they purchased three and five liter flasks and only a one liter heating mantle. Therefore, the heating mantle could not be used with this equipment. Additionally, there were no rheostats found to operate the heating mantles. Therefore, there is a serious question

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[14] It should be noted that at the time of the charge and conviction in *Monroe*, methylamine was a listed precursor chemical whereas, at the time of the search and the initiation of the charge in the instant case, isosafrole was not a precursor chemical, although it was added to the list shortly thereafter. 21 U.S.C. Section 802 (34).

whether a rational trier of fact could find that any such inference created could support guilt as opposed to supporting the given defense that the defendants were in the process of increasing the inventory for Riggins' retail chemical business.

In addition to the weakness of the inferences to support the required conclusion, several of the "inferences" relied upon by the Sixth Circuit are not supported by the evidence. For example, the court relies upon the inference "that Riggins could presumably have gotten isosafrole at a better price from distributors nearer to his 'business' than Eastman." (opinion of the 6th Cir. at 15: Appendix 16a). However a closer look at the proof behind this inference demonstrates that it is based upon the following testimony given by Mr. Hapeman, the representative of Eastman Kodak;

> Q. Is Eastman Kodak the closest chemical company that sells Isosafrole to the western district of Kentucky for the western area of Kentucky?
>
> A. I would *guess* not, *I don't know the answer to that*, but since Isosafrole and menthanol are supplied by a number of chemical companies I would *guess* someone has an office or distribution point closer to Kentucky than were are in Rochester, New York.

In addition, Mr. Hapeman testified on cross examination that he had not looked at the catalogs of other companies and had never compared Eastman Kodak's prices for Isosafrole with those of other chemical companies. (*Hapeman* at T.R. Vol. 2: 29, 34). Certainly, it is appropriate for a reviewing court to question whether a witness's guess concerning a fact in evidence relating to a subject upon which he candidly admits not knowing the answer and for which he admits never investigating the issue can constitute "substantial evidence" as a matter of law upon which a "rational trier of fact" could conclude that a reasonable inference has been created.

The Sixth Circuit simply goes too far in suggesting that a court reviewing a jury verdict under Rule 29(c), Federal

Rules of Criminal Procedure, has no authority to consider the value of the inferences that can be drawn from the testimony. In essence, far from the assumption made by the court below in order to substantiate its conclusions, all inferences are not created equal and, as a matter of law, all inferences cannot be given equal weight.[15] The reviewing court can find that as a matter of law certain inferences that may be able to be drawn from the evidence do not automatically create a review proof jury verdict. To accept the conclusions of the Sixth Circuit in this matter would be to render Rule 29(c) a nullity, as, in almost every case, there is at least some inference that can be drawn from the evidence that would support the jury's conclusion. It is clear that Rule 29(c) is not intended to only apply when the government fails to put on any evidence supporting a particular element of crime. Otherwise the review under Rule 29(c) would be limited to the error of the trial court in failing to grant a judgment of acquittal under Rule 29(a) by erroneously submitting the case to the jury. Moreover, the analysis of the court below would render meaningless Rule 29(b) which allows a trial court to reserve a decision on a Rule 29(a) motion until after a decision by the jury. Under the Sixth Circuit's holding, once the jury returned a verdict of guilty the court could never again grant a judgment of acquittal since the trial court obviously found beforehand that there was some evidence supporting all elements of the crime.

It is for these reasons that the opinion below is clearly antagonistic to the prior decisions of this Court and to the principles set forth in Rule 29(c).

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[15] See footnote 20, page 16, opinion below, Appendix 17a, wherein the court holds that an inference sufficient to establish probable cause also supports guilt beyond a reasonable doubt.

D. BY ADOPTING THE CITATIONS OF THE GOVERNMENT IN THE BRIEF OF THE APPELLANT WITHOUT ANY CRITICAL ANALYSIS, THE COURT OF APPEALS DEPRIVED THE PETITIONERS OF DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court has often noted that as a matter of due process an individual has a right to the first level of appeal once that right is established by statute or other provision. *See, e.g., Douglas v California*, 372 U.S. 353, 357 (1963); *Coppedge v. United States*, 369 U.S. 438, 452-454 (1962). Therefore, as in the instant case, when the appellate court departs from the accepted and usual course of judicial proceedings, it not only calls for the exercise of the supervisory powers of the Court, but also constitutes a violation of the due process right of the petitioners to a reasoned and studied review of the trial court's decision.

As alluded to in Section C above, in the case at bar it appears that the court of appeals has adopted the case citations of the government in its Brief of the Appellant without any regard for independent analysis. As noted above, the first example the court references in discussing the inferences properly drawn, the court states that the evidence that was "most 'damning'" to the petitioners was the "concealment of chemicals and supplies behind a sheet of plywood in Riggins' attic." The court below states, " '[h]iding, disguising, repackaging, or otherwise concealing supplies as evidence of guilt.' *See United States v Wagner*, 884 F. 2d 1090 (8th Cir. 1989), *cert. denied*, 494 U.S. 1088 (1990)." (Opinion of the Sixth Circuit at 14, 15; Appendix 16a). Two observations of this citation are relevant and important. First, the portion of the quoted material in the subquotes was taken directly from the government's brief and the citation of *Wagner* is also from government's brief except that the signal "see" was added as was the citation for the denial of certiorari. Second, and perhaps most important, *Wagner* never holds nor suggests this conclusion. Athough, the rendition of the facts states that the defendants in *Wagner* did use false names, removed labels

and repackaged chemicals, the court mentions the removed warning labels as one of the myriad pieces of evidence supporting the verdict but otherwise fails to consider these facts when considering the issue of the sufficiency of the evidence. 884 F.2d at 1096, 1097.

Another instance on point is the circuit court's reliance on *United States v Johnson*, 767 F.2d 673 (l0th Cir. l985) for both the proposition that an inference of guilt was created by the defendant's purchase of expensive equipment capable of being utilized in the drug manufacturing process and also the proposition that using cash as opposed to using checks for business transactions created a further inference of guilt. These were both theories that were advanced in the government's brief. Therein the government suggested:

> Purchasing expensive equipment adds to the body of evidence upon which guilt may rest. Most people do not buy expensive chemicals or equipment as a hobby, or for personal enjoyment. High priced commerical products such as very expensive triple-necked flacks [sic] indicate a profit motive. In the absence of apparent legitimate business purpose, the high cost of products indicates criminal intent. *See, e.g., United States v Johnson*, . . . ($l5,000 purchase of phenylacetone).

(Brief of Appellant at l7, l8). The lack of reasoned review and scholarship by the Sixth Circuit is again demonstrated by the fact that the court in *Johnson* says not a single word about equipment. Rather the case involves only the attempt to purchase fifty-five gallons of phyenylacetone which at the time itself was a controlled substance. The court, in finding the the evidence was sufficient to prove attempt rather than mere preparation, stated:

> Defendant's conduct displayed acts sufficient to support this conviction: he asked that the substance he agreed to purchase be mislabeled; he insisted on being called by an alias; he agreed to pay an inflated price [triple the regular price] for the material [phyenylacetone]; and finally he mailed $l5,000 to Mr. Parish [the sup-

> plier] with the understanding it was a partial payment for 55 gallons of phyenylacetone.

767 F. 2d at 675. There is simply no mention in *Johnson* with regard to the defendant using cash rather then checks. Although the court clearly mentions that $15,000 was paid and that it was paid in two payments, the first $10,000 and the second $5,000, there is no indication as to the form of those payments indicating whether they were by cash, cashier check or in any other form. Given the apparent failure of the decision in *United States v Johnson* to support its use in the citation by the court below, it must be assumed that the court adopted the citation by the government without any independent analysis of the opinion that was being cited.

Similarly the citation of *United Stated v Green*, 548 F. 2d 1261 (6th Cir. 1977), for the proposition that possession of the book entitled *Drug Manufacturing for Fun and Profit* supported the jury verdict in the instant matter appears to be without consideration of the fact that in *United States v Green* the drug being manufactured was in fact referred to in *Drug Manufacturing for Fun and Profit* while there is no mention of the manufacture of 3, 4 methylenedioxyamphetemine in that publication.

These citations therefore illustrate a lack of critical analysis by the court below. The petitioners were entitled to the careful and studied review of there convictions and the failure of the court to do so deprived them of due process.

CONCLUSION

For the reasons set forth, this Court should grant the Petition for a Writ Certiorari filed by Bud Riggins and Donald McVean and review the decision of the United State Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 93-5075; 93-5076

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

BUD RIGGINS and DONALD MCVEAN,
Defendants-Appellees.

FILED
FEB 23 1994
LEONARD GREEN, Clerk

On Appeal from the United States District Court for the Western District of Kentucky

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Before GUY and SILER, Circuit Judges; and CHURCHILL, Senior District Judge.*

PER CURIAM. After a jury trial, defendants were convicted of conspiracy and attempt to manufacture a controlled substance, in violation of 21 U.S.C. § 846, as well as possession of triple-neck round-bottom flasks with intent to manufacture a controlled substance, in violation of 21 U.S.C. § 843(a)(6). Defendants filed a post-trial Rule 29 motion for judgment of acquittal, which the district court granted. The government now challenges the court's decision. Finding that a reasonable jury could have concluded that defendants' conduct satisfied, beyond a reasonable

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* The Honorable James P. Churchill, United States District Court for the Eastern District of Michigan, sitting by designation.

doubt, the elements of the charged offenses, we reverse and remand.

I.

In May 1991, Bud Riggins placed an order for ten kilograms of isosafrole and twenty liters of methanol with Eastman Fine Chemicals ("Eastman") of Rochester, New York. For numerous reasons, Riggins's isosafrole order aroused the suspicion of Richard Hapeman, Eastman's manager of quality assurance. For instance, isosafrole was, at the time, a chemical found on the DEA's " 'watch list,' an informal list of chemicals often used illegally which is published to suppliers."[1] In addition, the order was far larger than standard orders, which typically do not exceed one kilogram. Hapeman also noted that Riggins did not apper to be using a business address, and that the business Riggins had listed, Logan Ag Lab & Supply, had never before placed an order with Eastman. Furthermore, Riggins initially informed Hapeman that he wanted the chemicals shipped COD, a request that Hapeman could not honor given company policy. That Riggins would decide to initiate dealings with Eastman at that point seemed particularly strange to Hapeman, especially since, as Hapeman surmised, Riggins could have sought out other suppliers that were not only geographically closer to him, but also could offer a better price.

Dubious as to Riggins's intentions, Hapeman sought and obtained Riggins's written assurance that the chemicals would not be used in any food or drug or in a residential setting. Hapeman also contacted the DEA, notifying the agency as to his suspicions. The case was then referred to the DEA office in Louisville, Kentucky. Louisville DEA agents contacted the DEA laboratory in Chicago and were

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[1] Isosafrole does have some legitimate uses. It can be used, for example, as part of the manufacturing process for flavorings or fragrances.

informed that isosafrole is a precursor to the manufacture of 3, 4-methylenedioxyamphetamine ("MDA"), a schedule I hallucinogen under 21 U.S.C. § 812.

After getting conformation from Eastman that Riggins had indeed placed the order in question, Louisville DEA Agent Gary Tennant decided to make a controlled delivery of the chemicals. Although a perusal of the local phone book did not reveal a phone number for either Riggins or the Logan Ag Lab & Supply Company, Tennant did manage to find a number to call by consulting various shipping documents. The individual who answered the call, "Don," instructed that the delivery be made to an airplane hanger on Riggins's farm in Logan County, Kentucky.

After the isosafrole package had been equipped with a beeper transmitting device, a delivery for the full amount under Riggins's order took place on June 10, 1991. A person identifying himself as Clarence Gamble[2] accepted the delivery. As the delivery was being made, Tennant noticed a "distinctive chemical smell," which he associated with acetic anhydride, a substance used in the production of amphetamines. The DEA continued their surveillance of the area for nearly 40 hours.

On June 11, 1991, the DEA, accompanied by state and local police, executed a search of the hanger and the surrounding area. As the investigators arrived on the scene, Riggins remarked: "[Y]ou are here about them chemicals ain't you." (App. 234.) He then informed the agents that he had removed the isosafrole and methanol from the hanger to a residence on the property. At the time, the residence, though owned by Riggins, was occupied by Donald McVean, a friend and business associate of Riggins. During the search of the hanger, DEA Agent Arnold Fitzgerald,

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[2] According to Riggins and McVean, Gamble was not a Logan Ag employee, but rather, a farmhand who had no connection to the company.

much as Tennant had done the day before, noticed the smell of acetic anhydride.[3] The search did, in fact, uncover acetic anhydride as well as hydrobromic acid and 11 marijuana plants. Perhaps as revealing as what the agents did find was what they did not find: "There was no evidence found indicating the existence of a legitimate chemical business. There was no evidence of the presence of fire safety equipment or use of safety storage principles."

The agents also searched Riggins's pick-up truck, which was parked outside the hanger. In the back seat, they found a book entitled "Drug Manufacturing for Fun and Profit." While the book did not include a recipe for MDA, it did devote a chapter to the manufacture of dimethyltryptomine, or "DMT," a controlled substance manufactured in much the same way as MDA.

The most plentiful source of evidence turned out to be Riggins's residence, located in a large clearing at a "considerable distance from any other building" on the farm. While the agents left the premises to secure a search warrant for the residence, McVean was permitted to remain inside unattended for approximately 30 to 40 minutes. When the agents returned,[4] and immediately upon entering the residence, Tennant and Fitzgerald detected "a very pungent and strong smell of ether."[5]

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[3] Citing the testimony of Odest Washington, Riggins and McVean dispute the contention that the hanger smelled of acetic anhydride. Washington testified that, since the hanger was ventilated and the chemicals were in a sealed condition, it would have been difficult for the smell of the substance to have permeated the hanger.

[4] Upon seeing the agents, McVean is alleged to have asked Riggins: "[B]oss, boss, what do you want me to do." (App. 236.) Riggins responded: "[J]ust . . . shut up." (*Id.*)

[5] Ether is "a solvent commonly used in chemical synthesis including the manufacture of illegal drugs." Again, Riggins and McVean claim that the agents were tricked by their senses. If ether, a highly explosive solvent, had been present in the air, they maintain, McVean would not

A thorough search ensued after the agents ventilated the residence. In the living room, the agents noted the following "scattered about" items:

Isosafrole—(10) 1 kilogram bottles—full; (2) 500 milliliter bottles—full and 1/2 full

Methanol—(1) 20 liter metal can—full

Ethyl Alcohol—(2) 4 liter bottles—full and 1/2 full

Sulfuric Acid—(1) 6 1/2 liter bottle—full and (1) 2 1/2 liter bottle—1/2 full

Hydrogen Peroxide 30%—(5) 500 milliliter bottles—full; (1) 4 liter glass bottle—1/2 full

Ethyl Ether (EM)—(10) 1 liter bottles—(9) full; (1) 1/2 full

Ethyl Ether (Fischer)—(1) 4 liter bottle—1/2 full

Alumina Activated—(1) 2 1/2 liter bottle—full

Toluene—(1) 4 liter bottle—full

Formic Acid 88%—(4) 4 liter plastic bottles—3 1/4 full

Formic Acid—(2) 2/5 liter plastic bottles—full

Aluminum Metal—(2) 500 milligram plastic bottles—full

Isopropyl 70%—(12) 1 pint bottles—full (Wal-Mart brand)

Isatoic Anhydride—(1) 500 gram bottles—full

Muriatic Acid—(1) 1 gallon plastic bottle—full

Chromium Trioxide—(1) 1 liter bottle—full

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have lit a cigarette while in the residence. Riggins and McVean also note that the agents reported no side effects (*e.g.*, nausea, headaches) commonly associated with the inhalation of ether.

Sodium Acetate—(1) 25 pound plastic bottle

The agents also discovered (3) 3,000 milliliter single neck flasks; (1) 1,000 milliliter single neck flask; and (1) hot plate.

In addition to a Lyman 500 scale, an Ohaus GT 8000 scale and (2) lab thermometers, a search of the kitchen yielded:

Acetone[6]

Phosphoric Acid—(1) 2 1/2 liter bottle—3/4 full

Raney-Nickel[7]—(5) 100 gram metal containers—full (stored in refrigerator)

Chromium Trioxide—(1) 500 gram bottle—1/2 full

Inositol[8]

Empty Gelatine Capsules[9]—(2) plastic zip lock bags containing approximately 420

In a first floor bedroom, the agents found a computer that was in the process of printing out documents. These documents, Riggins and McVean contend, were catalogs that they had intended to send to companies in the chemical supply industry. A search of another bedroom netted the agents a loaded .38 caliber Smith & Wesson revolver. The revolver was found on a night stand beside a bed. McVean apparently had been using the room as his sleeping area.

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[6] There is some dispute as to whether this substance was actually recovered. Riggins and McVean contend that the can that allegedly contained the acetone may have been empty.

[7] This substance is a reducing agent for illicit drugs and can be used in the manufacture of MDA.

[8] This powder is "mainly used in cutting [and thereby increasing the volume of] cocaine, methamphetamine, or other drugs." (App. 104.)

[9] These capsules provide one way of packaging MDA.

The agents also searched the attic. The items found there were particularly noteworthy because they had been concealed behind a sheet of plywood. Once McVean found out that the hiding place had been discovered, he said: "[O]h shit."[10] The attic is where the agents located Riggins's and McVean's most sizable cache:

Hydrochloric Acid—(1) 2 1/2 liter bottle—3/4 full

Potassium Dichromate Merk—(1) 1 pound container—full

Ethyl Alcohol—(1) 4 liter bottle—1/10 full

Acetic Acid, Glacial—(1) 2 1/2 liter bottle—full

Ethyl Acetate—(1) 4 liter bottle—3/4 full

Formamide—(1) 1 quart bottle—full

Diethyl Malonate—(1) 2 kilogram bottle—1/2 full

Phenylacetaldehyde—(2) 250 gram bottles—3/4 full each

1-Bromoethyl Benzene—(1) 100 gram bottle—1/2 full

N-Butyl Chloride—(1) 4 liter bottle—full

Nitric Acid—(2) 2 1/2 liter bottles—full

Titrant Standard Potassium Hydroxide Alcoholic—(2) 500 ML bottle—full

Isosafrole—(3) 250 gram bottles—full

Isonitrosoproprophenone—(4) 1/2 quart bottles—full

Magnesium metal—(6) 500 gram bottles—full

Unknown liquid—(1) 4 liter bottle—1/4 full

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[10] Subsequently, as he was being transported to the Jefferson County Jail, McVean told Tennant that "if he had known he was going to jail he would have jumped out the back window, swam his ass up that creek and I would never have seen him again." (App. 240.)

Potassium Permanganate—(2) 500 gram bottles—full

Pyridine—(1) 1 one liter bottle—1/4 full

Phenylacetyl—(4) 100 gram bottles—3/4 full

Toluidine—(1) 500 gram bottle—full

Acetyl Acetone—(2) 500 milliliter bottles—full

Carbon Tetrachloride—(1) 500 milliliter bottle—full

Phenylacetonitrile—(1) 1 kilogram bottle—full

Methyl Iodide—(1) 100 milliliter bottle—full

Chromium Trioxide—(1) 500 gram bottle—full

The attic also produced the following paraphernalia:[11] (3) 5,000 milliliter triple neck flasks, (3) 3,000 milliliter triple neck flasks, (4) 4,000 milliliter Pyrex beakers, (1) heating mantel (100 ml.),[12] separatory funnels, graduated cylinders, and condensers.

In March 1992, on the strength of the evidence obtained as a reuslt of the searches detailed above, a federal grand jury returned a seven-count indictment naming Riggins and McVean as defendants. Specifically, the indictment listed several counts relating directly to the defendants'

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[11] A government witness would later estimate the total value of the paraphernalia—the best equipment available for making MDA—at approximately $20,000.

[12] The 100 ml. figure is probably an error. The correct designation is 1,000 ml.

alleged MDA operation, including: conspiracy[13] (Count 1) and attempt[14] (Count 2) to manufacture MDA, in violation of 21 U.S.C. § 846; and possession of triple-neck round-bottom flasks with intent to manufacture MDA, in violation of 21 U.S.C. § 843(a)(6)[15] (Count 5). The indictment also

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[13] In *United States v. Lee*, this court noted:

> [T]o sustain a conviction [for conspiracy] under 21 U.S.C. § 846, the government is required to prove the existence of an agreement to violate the drug laws and that each conspirator knew of, intended to join, and participated in the conspiracy.
>
> "The existence of a criminal conspiracy need not be proven by direct evidence, a common plan may be inferred from circumstantial evidence." Circumstantial evidence standing alone can sustain the jury's verdict, and such circumstantial evidence need not remove every reasonable possibility except that of guilt.
>
> Moreover, once the existence of a conspiracy has been proven, only slight evidence is necessary to implicate a defendant. Further, proof of a formal agreement among the conspirators is unnecessary; a tacit or mutual understanding among the parties is sufficient to show a conspiracy. In addition, "[e]very member of the conspiracy need not be an active participant in every phase of the conspiracy, so long as he is a party to the general conspiratorial agreement."

991 F.2d 343, 348 (6th Cir. 1993) (citations omitted).

[14] The two requisite elements of an attempt are (1) an intent to engage in criminal conduct and (2) the performance of one or more overt acts which constitute a substantial step towards the commission of the substantive offense." *United States v. Williams*, 704 F.2d 315, 321 (6th Cir.) (citations omitted), *cert. denied*, 464 U.S. 991 (1983).

[15] This provision states:

> **(a) Unlawful acts**
>
> It shall be unlawful for any person knowingly or intentionally—
>
> . . .
>
> (6) to possess any three-neck round-bottom flask, tableting machine, encapsulating machine, gelatin capsule, or

contained two firearm charges: the use and carrying of a firearm, in violation of 18 U.S.C. § 924(c) (Count 3); and possession of a firearm by a convicted felon,[16] in violation of 18 U.S.C. § 922(g)(1) & (2) (Count 4). Finally, the indictment charged Riggins with two other drug-related offenses: manufacturing marijuana, in violation of 21 U.S.C. § 841 (Count 6); and possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1) (Count 7).

At trial, defendants attempted to portray their operation as a legitimate chemical supply and produce business, not an illicit drug manufacturing center. Testimony given during the trial established that the government tested samples of 10 out of the 41 substances found as a result of the search. The government's chemist, Odest Washington, opined that Riggins's farm provided an ideal setting for a clandestine laboratory because it was well hidden by trees. As to the chemicals found on the farm, Washington testified that eight of them could have been used to manufacture MDA: isosafrole, formamide, formic acid, sulfuric acid, hydrochloric acid, hydrogen peroxide, toluidine, acetone, and methanol.

Although virtually all of the ingredients to make MDA were thus present, Washington noted that several pieces of laboratory equipment vital to the manufacturing process were not. For instance, the government's search of Riggins's farm did not turn up a rheostat, a device for regulating temperature. In addition, the agents could not

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> equipment specially designed or modified to manufacture a controlled substance, with intent to manufacture a controlled substance except as authorized by this subchapter[.]

[16] Both Riggins and McVean had prior felony convictions to their credit. In fact, they met each other while they were serving prison time for their respective convictions. Their relationship would continue after they were released. The two even discussed pursuing a business venture together (the buying and selling of red oak). Eventually, McVean moved from Florida to Kentucky for the ostensible purpose of helping Riggins in the vegetable business.

locate ring stands, clamps, or other apparatus designed to hold the equipment during synthesis. Finally, Washington observed that the heating mantle found in the attic of Riggins's residence would not have fit the 3,000 or 5,000 millimeter flasks that were also found in the attic.

At the close of the government's case and again, at the close of all the proof, defendants moved for a judgment of acquittal pursuant Fed. R. Crim. P. 29. On both occasions, the district court denied defendants' motions. Subsequently, the jury returned a not guilty verdict against Riggins on Counts 4, 6, and 7. The jury did, however, convict both defendants on Counts 1, 2, and 5, and McVean on Count 4.[17]

Defendants filed a post-trial motion for a judgment of acquittal or, alternatively, for a new trial. At a sentencing hearing held on December 11, 1992, the court considered the facts that militated in the government's favor:

> [T]his is purely a circumstantial case, the circumstances favoring the verdict and the . . . government's position.
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> First of all and most damning and unexplained is the existence of the . . . empty capsules. Although there was proof that these are readily available new and could be bought from any health food store, nevertheless they were there. And for what purpose remains unexplained.
>
> The fact that ten kilos isosaphrol and an unusually large order, whether one kilo is a normal amount, according to the testimony of the Eastman chemical man. The fact that Eastman finds they had never done business with this man before, didn't know who they were. The videotape

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[17] Count 3 had been dismissed by the court prior to consideration by the jury.

> of the premises certainly didn't look like any legitimate chemical supply business. No signs, no listed telephone, no license from the County Court Clerk to do business.
>
> The fact that isosaphrol is a necessary precursor to the manufacture of MDA; that methanol may be used as a solvent. Methanol was also purchased. They used it as a solvent in the process.
>
> The existence of the book didn't have a lot of probative value in the son's car. Well, Drug Manufacture [f]or Fun and Profit doesn't tell you how to make MDA. And that's what we're dealing with here. But it is a factor.
>
> No customer receipts, no business records, nothing that would be normally found at a legitimate business. The chemicals were concealed in the attic behind . . . a piece of plywood. And, of course, we have the opinion of the DEA agent and chemist that they thought that's what was going on there. It was that this was attempted to manufacture MDA.

(App. 91-93.)

In the eyes of the court, the following facts weighed against the government:

> [T]here was no MDA on the premises, no evidence that they had ever completed the manufacture of MDA. Apparently there was no residue in the bottles. Or if there were the DEA failed to check for it. And no evidence of any residue completed the manufacture. No other evidence of conspiracy or agreement or specific intent to manufacture MDA. It's all fairly circumstantial. There's no, no co-conspirator statements or any other evidence of specific intent. It's a matter of

inference from the circumstances. There was no base present. The necessary acetone was absent. Mr. Washington's testimony about the substitution was terribly weak. I don't think Mr. Washington himself felt acetone was an adequate substitute. I watched him testify in that respect but nevertheless acetone was not present.

There were no heating mantles to fit these 3,000 and 5,000 millimeter flasks. One that was present is too small for those. There was no rheostat for regulation of the temperature which is absolutely essential for the manufacture of MDA according to the testimony. There were lots of other chemicals present. Some 51 total chemicals were present when most of those were unnecessary for the production of MDA. There was no recipe for the manufacture of MDA.

The testimony was that is a very complex procedure. All the chemicals present had other uses besides the manufacture of MDA.

Now, for a conviction of conspiracy or for a conviction for intent it's not necessary that the act be completed, that MDA be finally manufactured or that they even have the ability to complete the effort to manufacture MDA. There are cases where the specific intent is proven, that the absence of essential ingredient is not faded. But in those cases there was, there was evidence, other evidence of specific intent rather than the mere inference of specific intent from the presence of the chemicals. And that's all we have here, counsel. Some of the necessary ingredients for manufacture of MDA were present.

(*Id.* at 93-95.) The court then added:

> The Court has come to the conclusion that the proof is insufficient to prove guilt beyond a reasonable doubt. Motion for judgment of acquittal counts one, two and five by both Mr. McVean and Mr. Riggins will be granted.

(*Id.* at 95.) The government now appeals from this decision of the district court.[18]

II.

On appeal, the government asserts that the district court erred in granting defendants' motion for acquittal. In *United States v. Overmyer*, we discussed our standard of review pertaining to Rule 29 motions for acquittal:

> It is well settled that the test to be applied by a trial court in determining a defendant's motion for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure is taking the evidence and inferences most favorably to the government, if there is such evidence therefrom to conclude that a reasonable mind might fairly find guilt beyond a reasonable doubt, the issue is for the jury. The Supreme Court has observed that the granting of a motion of acquittal, ". . . will be confined to cases where the prosecution's failure is clear."
>
> An appellate court, in reviewing a trial court's decision regarding a Rule 29 motion, applies the same principles to the record it has before it. Other circuits have indicated the use of the same test following the trial court's reversal of a guilty verdict pursuant to Rule 29(c).

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[18] The district court did not disturb McVean's conviction under Count 4, for which he received a 21-month prison term.

> The 11th Circuit [has] stated the test for review of a verdict overturned by a judgment of acquittal as follows:
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> > On a motion for judgment of acquittal, the court must view the evidence in the light most favorable to the verdict and, under that light, determine whether the evidence is sufficient to support the verdict. Thus, on this motion, the court assumes the truth of the evidence offered by the prosecution.

867 F.2d 937, 938-39 (6th Cir.) (citations omitted), *cert. denied*, 493 U.S. 813 (1989).[19]

Consistent with the requirement that we view the evidence in the light most favorable to the verdict, we hold that the facts of this case warrant reversal of the district court's decision. In reaching this conclusion, we are mindful of our standard of review. We do not approach this case as would the initial fact-finder; instead, our analysis must begin with the decision of the jury. If that decision is one which reasonably could have been reached, our task

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[19] The parties disagree as to the relationship of two Sixth Circuit cases, both of which speak to the applicable burden of proof. In the first case (relied upon by defendants), *United States v. Leon*, 534 F.2d 667, 677 (6th Cir. 1976), the court stated: "Where the evidence as to an element of a crime is equally consistent with a theory of innocence as with a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt." As the government properly points out, however, we rejected this proposition in the later case of *United States v. Stone*, 748 F.2d 361, 362 (6th Cir. 1984). In *Stone*, we stated: "[C]ircumstantial evidence alone can sustain a guilty verdict and that to do so, circumstantial evidence need *not* remove every reasonable hypothesis except that of guilt." *See also id.* at 363 ("It is not necessary that circumstantial evidence remove every reasonable hypothesis except that of guilt. To the extent that our previous decisions have indicated our approval of a contrary rule, they are rejected and overruled."). Our holding in *Stone* is consistent with the Supreme Court's rulings on the matter. *See, e.g., Holland v. United States*, 348 U.S. 121, 139-40 (1954).

is complete; what this court would have determined or what the district court did, in fact, determine would thus be reduced to an irrelevancy.

The government produced circumstantial evidence from which the jury was asked to draw numerous inferences. That the evidence was exclusively circumstantial is not fatal to the government's position so long as the evidence does not require too great a "leap of faith in order to support a conviction." *United States v. White,* 932 F.2d 588, 590 (6th Cir. 1991). *See also United States v. Stone,* 748 F.2d 361, 362-63 (6th Cir. 1984) ("[C]ircumstantial evidence alone can sustain a guilty verdict and . . . to do so, circumstantial evidence need *not* remove every reasonable hypothesis except that of guilt."). Here, the government contends that sufficient evidence supports a jury verdict in its favor, the most "damning" of which is perhaps defendants' concealment of chemicals and supplies behind a sheet of plywood in Riggins's attic. After all, "[h]iding, disguising, repackaging, or otherwise concealing supplies is evidence of guilt." *See United States v. Wagner,* 884 F.2d 1090 (8th Cir. 1989), *cert. denied,* 494 U.S. 1088 (1990)).

Other pieces of evidence that, according to the government, support defendants' convictions are as follows: (1) that defendants collected nearly all of the chemicals essential to the manufacture of MDA, *see, e.g., United States v. Packer,* 730 F.2d 1151 (8th Cir. 1984); (2) that defendants purchased certain chemicals in amounts inconsistent with personal use, *see, e.g., United States v. Monroe,* 866 F.2d 1357 (11th Cir. 1989); (3) that defendants purchased expensive equipment capable of being utilized in the drug manufacturing process, *see, e.g., United States v. Johnson,* 767 F.2d 673 (10th Cir. 1985); (4) that Riggins used cash, as opposed to checks, for company transactions, *see, e.g., id.;* (5) that Riggins could presumably have gotten isosafrole at a better price from distributors nearer to his "business" than Eastman, *see, e.g., United States v. Fooladi,*

703 F.2d 180 (5th Cir. 1983)]; (6) that Riggins purchased chemicals from more than one supplier, *see, e.g., Packer*, 730 F.2d 1151; (7) that scant evidence existed suggesting that Logan Ag Lab & Supply was, in fact, a legitimate business, *see, e.g., United States v. Settegast*, 755 F.2d 1117 (5th Cir. 1985); (8) that delivery of chemicals was made to a nonbusiness, residential location, *see, e.g., United States v. Williams*, 603 F.2d 1168 (5th Cir. 1979), *cert. denied*, 444 U.S. 1024 (1980); (9) that Hapeman, Eastman's representative, had, himself, become suspicious, *see, e.g., United States v. Hare*, 772 F.2d 139, 142 (5th Cir. 1985); (10) that DEA agents detected the odor of ether upon entering Riggins's residence, *see, e.g., United States v. Mueller*, 902 F.2d 336 (5th Cir. 1990); (11) that a fully-loaded revolver was recovered from McVean's bedroom, *see, e.g., United States v. Sullivan*, 919 F.2d 1403 (10th Cir. 1990); and (12) that the book entitled "Drug Manufacturing for Fun and Profit" was found on Riggins's premises, *see, e.g., United States v. Green*, 548 F.2d 1261 (6th Cir. 1977).[20]

Counterbalanced against these facts, defendants contend, are those acknowledged by the district court during

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[20] Defendants argue that the cases relied upon by the government are inapposite because, for the most part, they deal only with determinations of "probable cause for a search and not sufficiency of the evidence beyond a reasonable doubt." (Appellee's Brief at 26.) Defendants' argument, however, is misguided, for the government cites the cases only to support the various inferences the jury apparently drew in analyzing the evidence before it. In the government's words:

> It makes no difference whether, in the particular case, the ultimate issue was probable cause or proof beyond a reasonable doubt. Riggins and McVean cannot credibly argue that the evidence may support a particular inference for probable cause and at the same time [argue] that it would be impermissible for the jury to draw the same inference from the same evidence. The point, again, is that the evidence cited can support the inference the United States advocates.

defendants' sentencing hearing, including the absence of an MDA recipe, any trace of the substance itself, and a few devices essential to the manufacturing process. Moreover, as defendants assert: "The critical items missing in this case are any advance surveillance to suggest that there were any conversations or statements made by Riggins or McVean suggesting that they intended to manufacture MDA or any other illegal drug."

Notwithstanding defendants' assertions, we feel that the facts of the instant case do not justify the granting of a Rule 29 motion. Although the evidence relied upon by defendants undoubtedly has some exculpatory value, the question remains whether a reasonable juror must find that such evidence creates a reasonable doubt as to defendants' guilt. Given the dearth of evidence substantiating defendants' claim that they were engaged in a legitimate business enterprise, coupled with the chemicals and related paraphernalia found on Riggins's premises, we conclude that a reasonable juror could come to the same conclusion previously reached by the actual jury here.[21]

III.

Finally, McVean argues that—irrespective of the government's case against Riggins—the evidence against him is insufficient to justify convictions for Counts 1, 2, and 5. McVean claims that "there was no evidence presented from which a jury could infer *either* that [he] had knowledge of the conspiracy and with that knowledge voluntar[ily] joined the conspiracy or had the specific intent to violate the statute."

McVean's argument, however, is without merit. While the evidence may have established that McVean was not

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[21] In reaching our decision, we offer no opinion as to whether one single fact, standing alone, would be sufficient to sustain defendants' convictions; instead, our decision is based on an evaluation of the facts in their entirety.

the chief conspirator, it did clearly prove that he was a co-conspirator. McVean was occupying the residence in which the DEA agents found most of the incriminating material. In addition, he was in possession of the revolver found in one of the bedrooms. Furthermore, McVean made several comments suggesting his knowledge of the illegitimate nature of his association with Riggins. On one occasion, as noted above, he exclaimed, "oh, shit," when agents discovered the stash that had been concealed in the attic. And as McVean was being transported to the local jail after his arrest, Agent Tennant testified that McVean remarked "if he had known that he was going to jail he would have jumped out the back window, swam his ass up that creek and [the authorities] would have never seen him again." (App. 140.)

In short, the jury had before it enough evidence from which to infer McVean's knowledge of and participation in a conspiracy to commit certain federal drug offenses.

Accordingly, the decision of the district court granting defendants' motion for a judgment of acquittal on Counts 1, 2, and 5 is **REVERSED**, and this case is **REMANDED** for further sentencing proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CRIMINAL ACTION NO. CR 91-00023-01 BG(W)

UNITED STATES OF AMERICA

PLAINTIFF

V.

BUD RIGGINS

DEFENDANT

JUDGMENT OF ACQUITTAL

This action was called in open Court on September 8, 9, 10, 11, and 15, 1992, for a jury trial. Mr. Mark Miller, Assistant U.S. Attorney, appeared for the United States of America; the defendant Bud Riggins was represented by Mr. Donald E. Dawson, his retained counsel.

The jury returned a verdict of guilty as to the defendant Bud Riggins on Count 1, Count 2 and Count 5 of the Superseding Indictment and not guilty as to Count 4, Count 6 and Count 7 of the Superseding Indictment. Count 3 of the Superseding Indictment was dismissed by the Court prior to consideration by the jury.

The Court set sentencing for December 11, 1992, at which time post-trial motions were also heard.

The Court heard from counsel on Riggins' Motion for Judgment of Acquittal and/or New Trial. The Court reviewed the evidence in favor of the jury verdict and also the evidence which weighed against the jury verdit. The Court was of the opinion that taking the proof in the light most favorable to the government, the proof was insufficient to establish guilt beyond a reasonable doubt, and no reasonable jury could find guilt beyond a reasonable doubt.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendant, Bud Riggins', Motion for Judgment of Acquittal is granted and all charges in the original indictment and the superseding indictment against the defendant are dismissed.

IT IS FURTHER ORDERED that the defendant be placed on a $100,00.00 property bond secured by the property owned by Ms. Willie A. Riggins and with Ms. Willie A. Riggins signing as surety on said bond to secure the appearance of the defendant pending the conclusion of any appeal that might be filed.

This 29 day of Dec, 1992.

/s/ Thomas A. Wiseman
Thomas A. Wiseman, Judge
United States District Court
Sitting by designation

Copies to

USA
USP at BG & Lvle
USM at BG & Lvle
Mr. Riggins
Mr. Dawson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Case Number: CR 91-00023-02 BG(W)

UNITED STATES OF AMERICA

V.

DONALD MCVEAN
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Defendant's Attorney: Assistant U.S. Attorney Mark Miller, Mr. Robert Bradley Coffman, appointed

THE DEFENDANT: pleaded **not guilty** to Counts 1, 2, 3, 4 & 5 of the Superseding Indictment on March 18, 1992; and

☐ pleaded guilty to count(s)_____.

☒ was found not guilty on count(s) 1, 2, 4, & 5 by a jury on September 15, 1992 after a plea of not guilty. The Court dismissed Count 3 prior to consideration by the jury, and the Court granted defendant's post-trial motion for judgment of acquittal as to Counts 1, 2 & 5.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section

18:922(g)(1),2

Nature of Offense

Aid and abet/felon in possession of firearm

Date Offense Concluded

6/11/91

Count Number(s)

4

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

☐ Count(s) _____ (is) (are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) 4 of Superseding Indictment, which shall be due ☒ immediately ☐ as follows: to the U.S. District Court Clerk, 241 East Main Street, Room 213, Bowling Green, Ky. 4210?.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 055-38-4025

Defendant's Date of Birth: December 12, 1949

Defendant's Mailing Address:

848 Riggins Road
Adairville, KY 42202

Defendant's Residence Address: Same

Date of Imposition of Sentence: December 11, 1992

Signature of Judicial Officer: /s/ Thomas A. Wiseman, Jr.

Name & Title of
Judicial Officer: Thomas A. Wiseman, Jr.,
United States District Court Judge

Date: Sitting by Designation December , 1992

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 21 Months, with the time already served to be applied toward the 21 month sentence, as to Count 4 of the Superseding Indictment.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district.

☐ _____ a.m.
☐ at _____ p.m. on _____ .

☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
☐ before 2 p.m. on _____ .
☐ as notified by the United States marshal.
☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

A special penalty assessment shall be paid by defendant to the United States District Court Clerk in the amount of $50.00 as to Count 4 of the Superseding Indictment immediately.

The Court determines that in view of the defendant's financial profile that he does not have the ability to pay a fine, nor the costs of imprisonment, nor the costs

of supervision. The Court waives imposition of a fine as well as the costs of incarceration and supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report. (As to Count 4)

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 12

Criminal History Category: III

Imprisonment Range: 15 to 21 months

Supervised Release Range: 2 to 3 years

Fine Range: $3,000 to $30,000

☒ Fine is waived or is below the guideline range, because of the defendant's ability to pay.

Restitution: $ N/A

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

CR 91-00023 BG(W)

UNITED STATES OF AMERICA,
PLAINTIFF
VS.

BUD RIGGINS AND DONALD MCVEAN,
DEFENDANTS

TRANSCRIPT OF PROCEEDINGS
DATE: DECEMBER 11, 1992
JAMES A. DALE, JR., INC.
REGISTERED PROFESSIONAL REPORTER
513 EAST TENTH AVENUE
P.O. BOX 392
BOWLING GREEN, KY 42102-0392

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The TRANSCRIPT OF PROCEEDINGS, taken before the Honorable Thomas A. Wiseman, Jr., pursuant to notice heretofore filed, in the United States District Courtroom, Second Floor, United States Courthouse, Main and Center Street, Bowling Green, Warren County, Kentucky on Friday, December 11, 1992, at 9:30 a.m., and to be used in accordance with the Federal Rules of Civil Procedure.

APPEARANCES

For the Plaintiff:
Mark Miller
Assistant U.S. Attorney
510 West Broadway

10th Floor
Louisville, KY 40202

For the Defendant - Bud Riggins:
Donald E. Dawson
Ray & Housch
211 Third Avenue North
P.O. Box 198288
Nashville, TN 37219

For the Defendant - Donald McVean:
R. Bradley Coffman
Coffman & Beck
418 1/2 East 10th Avenue
Bowling Green, KY 42101

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[3] **THE COURT:** This matter is set for hearing [4] this morning, hearing the motions in the case of [5] United States versus Bud Riggins and McVean.

[6] **MR. MILLER:** I'm here, your Honor. Mark [7] Miller for the United States, your Honor.

[8] **THE COURT:** Yes, sir.

[9] **MR. DAWSON:** Your Honor. I'm Donald Dawson [10] for Mr. Riggins.

[11] **MR. COFFMAN:** Mr. McVean is present. Brad [12] Coffman for the Defendant.

[13] **THE COURT:** All right. Let's hear you on [14] your motions, gentlemen.

[15] **MR. DAWSON:** Your Honor, the first motion [16] would be our motion for judgment acquittal. And I [17] think that we've fairly well covered the law [18] between the original motion for judgment of [19] acquittal that's been filed and the motion for [20] release on bonding pending sentencing, your Honor.

[21] I indicated there was some additional [22] cases; also corrected one error in the first [23] motion. And that was my citation to United States [24] versus Cook. I believe it's a Fifth Circuit case [25] and as I note in the—

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[1] **THE COURT:** Onbonte versus—

[2] **MR. MILLER:** That's right. But it [3] appeared that there was—the reason for the [4] reversal was that they pointed out additional facts [5] that supported the conviction that were not brought [6] to the Court's attention on the initial review. [7] And I think that's what made the difference.

[8] **THE COURT:** I read your submissions, Mr. [9] Dawson. So you may assume that and then go ahead [10] and argue it in any way you see fit.

[11] **MR. DAWSON:** Thank you, Your Honor. Your [12] Honor, this case has always seemed to us to be one [13] that's pretty much driven by the theory that the [14] United States simply didn't do their homework. [15] They didn't properly prepare the case. And had [16] they properly prepared it, it's the Defendant's [17] position that what the result would have been that [18] they would have learned that in fact Bud Riggins [19] and Mr. McVean were not involved in the production [20] of MDA.

[21] One thing I think that is significant in [22] the indictment in this case—this is not an [23] indictment that Mr. Riggins or Mr. McVean and [24] others known and unknown to the Grand Jury. This [25] is a two person conspiracy adequately indicted by

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[1] the theories presented by the government. And as a [2] result even if, for argument's sake, Mr. Riggins [3]

had other plans for isosaphrol such as to sell it [4] to some other third party without being as careful [5] as he might be or should be as to what that third [6] party might do with the isosaphrol.That's not the [7] indictment. The indictment is and the allegations [8] and the theory of the government was very clear [9] that Mr. Riggins had purchased that in order to [10] make MDA on the Riggins farm. There was never any [11] suggestion that at any other person was involved.

[12] In reviewing the cases that we were able [13] to find every one of those cases that are, of [14] course, were sustained on appeal there was [15] additional evidence. The government in their [16] response makes a point that we left out in several [17] cases the facts that were similar to this case. [18] And the reason that these were omitted was simply [19] because they were irrelevant to the decision making [20] process. The final solution in almost all of those [21] cases was that there was a major piece of evidence [22] that wasn't in existence here. There was the [23] finding of a formula by which the elicit drug could [24] be made. Clearly no formula was found. The [25] government has made a big point during the trial

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[1] and also in the post trial motions to mention the [2] book on Drug Making for Fun and Profit. I believe [3] that book is in evidence in this case. There's not [4] one word in that book about the manufacture of [5] MDA. And there's no allegation by the government [6] that in this case Mr. Riggins either processed the [7] chemicals or the intent to make DMA which is the [8] drug that's mentioned in that particular text.

[9] It's also clear from several of the cases [10] that the Court mentioned or the witnesses in those [11] cases mentioned that it would be very difficult to [12] make these products without the formula; that it's [13] not something

that you hold in your head and go out [14] and make; that this is something that you really [15] need to have a written formula to refer to.

[16] In addition when we asked how this was to [17] be done of Mr. Washington, he mentioned that he [18] believed that the way the process worked with 190 [19] degree Centigrade and all was called the loop-arc [20] reaction. And that was never fully addressed in [21] trial, but I think it's the government's burden to [22] show what that is and how that works. And they [23] never did.

[24] The proof was very clear and I don't think [25] the government disagrees that all of the chemicals

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[1] necessary to manufacture MDA were not present in [2] this case. We were missing at least two. There [3] was no acetone present even though the presentence [4] reports puts it back in. There was an empty can of [5] hardware grade acetone that was viewed in the—or [6] that was not mentioned into the can, of hardware [7] grade acetone that showed up in the videotape. It [8] never was put on the D.E.A. six. It was never [9] recorded for any purpose by the D.E.A.. So the [10] defense's testimony was that that was an empty can [11] and it had been used for cleaning some things.

[12] **THE COURT:** Underneath the sink.

[13] **MR. DAWSON:** It was on top of the sink, [14] and I think it was said—I think that's where it [15] was found was on top of the sink. It was on the [16] counter. I don't believe there's any testimony it [17] was ever anywhere else.

[18] The, so acetone was missing and then the [19] government suggested that during the trial that, [20] well, they could use acetal acetone. Conflicting [21] testimony on that; chemist Washington indicated [22] that that was

a possible substitute for the [23] acetone. Dr. Green testified that you couldn't use [24] it was a substitute because acetal acetone is a [25] solid and the chemical formula that was suggested

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[1] required to you pour cooled acetone into cooled [2] isosaphrol and essentially you'd be trying to pour [3] a solid into something.

[4] But nevertheless whether it could or could [5] not be used—and obviously the jury—I don't [6] know what the jury did with that. They might have [7] found that the acetone was not a problem under the [8] way the case was indicted.

[9] But whether or not it could be used; the [10] question becomes with someone that is supposedly as [11] sophisticated as the government wanted to make Bud [12] Riggins and going out and purchasing the equipment, [13] purchasing the chemicals; would he really go out [14] and buy acetal acetone when he needs acetone and he [15] can just go to the hardware store and buy acetone. [16] It's a readily available, common chemical product.

[17] The other thing that's missing in this [18] case is any surveillance that suggested any [19] activity. The other—

[20] **THE COURT:** You didn't mention the base. [21] I don't want to—

[22] **MR. DAWSON:** I'm sorry, Your Honor.

[23] **THE COURT:** I don't want to interrupt your [24] thinking, but there was no base present.

[25] **MR. DAWSON:** That's correct, too, your

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[1] Honor. And I appreciate that. There was no base [2] present. The testimony on that was that Mr. [3] Wash-

ington suggested that he use that type of [4] solution. Proof on that was that that's a test [5] grade chemical that's in known quantities, very [6] weak base used to determine the alkalinity or [7] acidity of something else. And that couldn't be [8] used for that process.

[9] And again the same argument there. Why [10] would somebody go and buy that particular base that [11] would be very, that would be very difficult to use [12] if it's to be used at all when they could simply go [13] buy any base and it would work just as well and a [14] lot better—there was no rheostat for regulating [15] the—there was no rheostat, your Honor.

[16] The government's theory was they were [17] going to use a triple neck flask; hence the charge [18] in, I believe it's count five. And yet they didn't [19] have even a mantle that would fit that.

[20] **THE COURT:** 3,000 and 5,000 milliliters.

[21] **MR. DAWSON:** Right.

[22] **THE COURT:** All right.

[23] **MR. DAWSON:** Those mantles, the ones they [24] had the D.E.A. six only actually listed one of [25] them. And it's, said it was a hundred milliliter

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[1] mantle. I think Mr. Washington testified that from [2] his recollection the hundred milliliter was in [3] error. In fact it was a thousand milliliter, and [4] the other one they found was also a thousand [5] milliliter. So again we've got a sophisticated [6] chemist going to make MDA. He doesn't even know [7] what size mantle to purchase.

[8] The bottom line in that, your Honor, is [9] that this evidence is consistent, is just as [10] consistent with innocence as it is with guilt. [11] It's just as consistent that these—and perhaps I [12] would suggest more so that it's

more consistent in [13] terms of circumstantial evidence that this [14] evidence, that these products were being purchased [15] for resale to hobby chemists, to experimental [16] chemists, to whoever Mr. Riggins sold them to.

[17] **THE COURT:** Or to amphetamine [18] manufacturers.

[19] **MR. DAWSON:** That's true, Your Honor. I [20] think that that is certainly among the [21] possibilities in this case that are floating out [22] there.

[23] **THE COURT:** But that's what they were [24] charged with.

[25] **MR. DAWSON:** That's right. I think we've

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[1] even cited one of the cases involving a person well [2] known to the government in this case, a Louisville [3] chemist who was convicted in Florida, I believe, of [4] just that; of selling chemicals to manufacturers [5] and declared to be a part of that conspiracy. But [6] that's not the charge, nor the allegation, nor the [7] proof.

[8] And then finally, your Honor, it's a [9] matter where the—I think we're pretty well—

[10] **THE COURT:** Well, you're getting ready to [11] talk about the fact that there was no other [12] evidence to corroborate the existence of a [13] conspiracy.

[14] **MR. DAWSON:** That's correct.

[15] **THE COURT:** Or an intent.

[16] **MR. DAWSON:** In each of the other cases [17] there is some surveillance. There's some effort to [18] watch the people as they're purchasing things. [19] There's evidence that they have only purchased [20] chemicals that can be made, that can be used to [21] make this particular drug. They don't buy just a [22] variety of chemicals. Or if they

do buy a variety [23] of it, they then are later seen trying to use this [24] variety to in fact make the particular drug in [25] question. Here there's none of that.

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[1] There's no suggestion that there's [2] telephone calls between Mr. Riggins and anybody [3] else. No one comes forward and says, "I've talked [4] to Mr. Riggins about buying MDA." There is simply [5] no evidence beyond the circumstantial, physical [6] evidence that was presented at Court. And it's our [7] position, your Honor, that that circumstantial [8] evidence is consistent with both guilt and [9] innocence.

[10] Therefore, a judgment of acquittal is [11] mandated in this case as is the situation in United [12] States versus Leon which addressed that subject and [13] indicates that when you have circumstantial [14] evidence it has to point clearly to conviction [15] before any conviction can be sustained.

[16] **THE COURT:** All right.

[17] **MR. DAWSON:** Your Honor—

[18] **THE COURT:** That concludes your argument [19] on this motion.

[20] **MR. DAWSON:** Yes, on this motion. That [21] does, your Honor.

[22] **THE COURT:** All right. Then, Mr. Coffman, [23] I'll hear you as well as Mr. Miller. You may [24] respond to both of them.

[25] **MR. COFFMAN:** Your Honor, I'll be brief.

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[1] I'll try not to repeat Mr. Dawson, because I think [2] the issues are essentially the same. I would point [3] out

that in this case the proof was that Mr. [4] McVean's role in relation to this situation was [5] even less tangible connected to Logan Ag Labs & [6] Supplies and Mr. Riggins. He did not order any [7] chemicals or glassware. He obviously printed a [8] catalog, did a great deal of work on it. He lived [9] in the house and he had some fingerprints on some [10] of the glassware. That was essentially the only [11] proof against Mr. McVean.

[12] I thought what the government did in this [13] case was a rather brilliant trial tactic. I will [14] give them credit for that. Because what they did [15] was essentially convince the jury that if Logan Ag [16] Labs and Supply was not in fact a legitimate [17] business then, therefore, you can infer and deduce [18] and convict the Defendants of conspiracy to [19] manufacture MDA. And that is not a high, that is [20] not a reasonable inference that can be drawn.

[21] They condemned Mr. Riggins' business and [22] in so doing allowed the jury to make that [23] conceptual leap that they were going to make MDA [24] when in fact there was no recipe. Not all the [25] ingredients were there. There are many extra

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[1] chemicals. There was no lab. They did not have [2] the necessary equipment. There was no finished [3] product. There were no sales.

[4] And in reviewing the case as submitted by [5] the government, by Mr. Dawson, the case as I found [6]—and I want to correct my position on Cooke, [7] too, because I made the same mistake Mr. Dawson [8] did. I can find no case where the Defendants were [9] convicted on this amount of evidence that was [10] allowed to stand.

[11] That's all I have to say on behalf of Mr. [12] McVean.

[13] **THE COURT:** All right, Mr. Miller.

[14] **MR. MILLER:** Your Honor, on behalf of [15] United States the Court has heard all the evidence [16] in this case as well as argument, and I will not [17] rehash that with the Court.

[18] I will point out that these gentlemen are [19] charged with conspiracies and attempts. And [20] although there are probably 15 to 20 cases cited in [21] both parties' briefs, there is only one or two [22] where the Court has failed to sustain a conviction [23] based on circumstantial evidence.

[24] I submitted to the Court quite candidly in [25] my response that each of those cases stand on their

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[1] own facts, and I don't think that I can stand here [2] and compare each and every one of them. I did [3] notice in reviewing those that jellcaps, for [4] example, were not mentioned. In some of the cases [5] the distinctive smell of ether was mentioned. It [6] was part of the circumstantial evidence taken into [7] consideration. In some of the cases the, hiding [8] the chemicals after purchasing them was [9] circumstantial evidence of an intent to engage in [10] an illegal activity. And I'd ask the Court to [11] recall that testimony and in reviewing the evidence [12] in the light most favorable to the government [13] render a decision favorable to the government.

[14] And lastly I also want to, since I failed [15] to mention in my brief, remind the Court that in [16] some of the rebuttal testimony, in some of the [17] cross-examination I believe there was evidence [18] presented to indicate that Mr. Riggins had indeed [19] purchased things like rheostats and clamps and that [20] previously, and so the government was able to show [21] at least one time they were in his possession. The [22] government's theory obviously is that they [23] conspired, attempted to manufacture these events.

[24] The United States never promised this jury [25] of this Court that they would show that

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[1] manufacturing showed on that premises. Thank you.

[2] **THE COURT:** All right, sir. Anyone wish [3] to be heard further?

[4] **MR. DAWSON:** Your Honor, just very, very [5] briefly. Of course, again the testimony of the [6] rheostats and the purchases, those were items that [7] were not particularly relevant in time. And also [8] are consistent with a retail chemical and chemical [9] equipment business; that they would be purchased [10] and later sold and therefore weren't on the [11] premises.

[12] **THE COURT:** Was that the fellow from [13] Nashville who has the chemical supply house?

[14] **MR. DAWSON:** That's, I believe that's [15] correct, your Honor.

[16] **MR. MILLER:** (Nodding head [17] affirmatively).

[18] **MR. DAWSON:** Rock City that sells mostly [19] wastewater and fresh water testing devices and has [20] a variety of chemistry equipment that they sell to [21] individuals.

[22] I think the evidence was that some of [23] these products are hard to buy from for individuals [24] that just want to experiment with chemistry. And [25] therefore, it's consistent to have a business like

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[1] Mr. Riggins that does sell to that market for [2] people that want to do legitimate experimental [3] chemistry on their own and don't buy sufficient [4] quantities to be able to buy from the larger [5] houses.

[6] I think that the individual from Kodak, [7] Eastman Kodak basically said that they didn't sell [8] to individuals. They basically sell to companies. [9] They sell to people that have accounts with them. [10] So it is again consistent with the defense and also [11] consistent with the evidence that this is a niche [12] sort of industry that Mr. Riggins was filling; and [13] that that type of company, if known, wouldn't [14] necessarily have to have all the other aspects of a [15] business. They wouldn't have to put out a sign. [16] People know that if you want to buy chemicals or [17] equipment you call Bud Riggins. Various people [18] across the country knew that and knew how to [19] contact him. And, therefore, could do it.

[20] Again, it's also consistent with, as the [21] Court indicated, a business that sells without [22] question or without proper controls to people that [23] are in fact making illegal drugs. But there's no [24] proof of that in this case. If the government had [25] continued their investigation, they may have

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[1] developed that if it were in fact true. Our [2] position is that it's not true; that if they had [3] continued their investigation it would have proven [4] that Mr. Riggins was simply a legitimate retail [5] chemical and equipment sales person.

[6] Your Honor, therefore, we still contend [7] that the evidence in this case simply is [8] insufficient to support the conviction.

[9] **THE COURT:** Mr. Coffman, do you wish to be [10] heard further?

[11] **MR. COFFMAN:** Nothing further.

[12] **THE COURT:** Well, this is a troubling [13] case. The question is not whether or not this [14] Court believes Mr. Riggins and/or Mr. McVean are [15] guilty or innocent.

The question is whether any [16] rational trier of fact on this evidence could have [17] found these Defendants guilty. And in making that [18] determination the Court must indulge every [19] reasonable inference in favor of the jury's verdict [20] and view the evidence in the light most favorable [21] to the, to the government's position and to the [22] validity of the verdict.

[23] I've read your submissions. I remember [24] the case well. And I thought about that case a [25]lot. Now, the circumstances—this is purely a

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[1] circumstantial case, the circumstances favoring the [2] verdict and the government, government's position.

[3] First of all and most damming and [4] unexplained is the existence of the, is of the [5] capsules, the empty capsules. Although there was [6] proof that these are readily available new and [7] could be bought from any health food store, [8] nevertheless they were there. And for what purpose [9] remains unexplained.

[10] The fact that ten kilos isosaphrol and an [11] unusually large order, whether one kilo is a normal [12] amount, according to the testimony of the Eastman [13] chemical man. The fact that Eastman finds they had [14] never done business with this man before, didn't [15] know who they were. The videotape of the premises [16] certainly didn't look like any legitimate chemical [17] supply business. No signs, no listed telephone, no [18] license from the County Court Clerk to do [19] business.

[20] The fact that isosaphrol is a necessary [21] precursor to the manufacture of MDA; that methanol [22] may be used as a solvent. Methanol was also [23] purchased. They used it as a solvent in the [24] process.

[25] The existence of the book didn't have a

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[1] lot of probative value in the son's car. Well, [2] Drug Manufacture For Fun and Profit doesn't tell [3] you how to make MDA. And that's what we're dealing [4] with here. But it is a factor.

[5] No customer receipts, no business records, [6] nothing that would be normally found at a [7] legitimate business. The chemicals were concealed [8] in the attic behind, behind a piece of plywood. [9] And, of course, we have the opinion of the DEA [10] agent and chemists that they thought that's what [11] was going on there. It was that this was attempted [12] to manufacture MDA.

[13] Circumstances weighing against the finding [14] of guilt and weighing against a jury verdict was [15] the fact that there was no MDA on the premises, no [16] evidence that they had ever completed the [17] manufacture of MDA. Apparently there was no [18] residue in the bottles. Or if there were the DEA [19] failed to check for it. And no evidence of any [20] residue completed the manufacture. No other [21] evidence of conspiracy or agreement or specific [22] intent to manufacture MDA. It's all fairly [23] circumstantial. There's no, no co-conspirator [24] statements or any other evidence of specific [25] intent. It's a matter of inference from the

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[1] circumstances. There was no base present. The [2] necessary acetone was absent. Mr. Washington's [3] testimony about the substitution was terribly [4] weak. I don't think Mr. Washington himself felt [5] acetone was an adequate substitute. I watched him [6] testify in that respect but nevertheless acetone [7] was not present.

[8] There were no heating mantles to fit these [9] 3,000 and 5,000 millimeter flasks. One that was [10] present is too small for those. There was no [11] rheostat for reg-

ulation of the temperature which is [12] absolutely essential for the manufacture of MDA [13] according to the testimony. There were lots of [14] other chemicals present. Some 51 total chemicals [15] were present when most of those were unnecessary [16] for the production of MDA. There was no recipe for [17] the manufacture of MDA.

[18] The testimony was that is a very complex [19] procedure. All the chemicals present had other [20] uses besides the manufacture of MDA.

[21] Now, for a conviction of conspiracy [22] or for a conviction for intent it's not necessary [23] that the act be completed, that MDA be finally [24] manufactured or that they even have the ability to [25] compelte the effort to manufacture MDA. There are

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[1] cases where the specific intent is proven, that the [2] absence of essential ingredient is not faded. But [3] in those cases there was, there was evidence, other [4] evidence of specific intent rather than the mere [5] inference of specific intent from the presence of [6] the chemicals. And that's all we have here, [7] counsel. Some of the necessary ingredients for [8] manufacture of MDA were present.

[9] The Court has to come to the conclusion [10] that the proof is insufficient to prove guilt [11] beyond a reasonable doubt. Motion for judgment of [12] acquittal counts one, two and five by both Mr. [13] McVean and Mr. Riggins will be granted. Mr. McVean [14] remains convicted on counts four, possession of a [15] firearm by a convicted felon. Mr. Riggins will be

[17] **MR. MILLER:** Your Honor, may I? The [18] United States requests the Court postpone—I [19] believe it's for a period of ten days—the entry [20] of this order so that we may evaluate the [231] situation.

[22] **THE COURT:** Yes, sir. You may. Yes, [23] sir. That will be, that will be done. In the [24] meantime, however, Mr. Riggins will be admitted to [25] bond which will also serve as his bond pending

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[1] appeal if the government chooses to appeal. [2] Hundred thousand dollar surety bond signed by his [3] mother and deed of trust on the farm.

[4] Now then I will hear you, Mr. Coffman, on [5] what should be done with Mr. McVean regarding the [6] count four conviction.

[7] **MR. COFFMAN:** Well, your Honor—

[8] **MR. COFFMAN:** Well, let me tell you now [9] that my tentative findings—and I'll allow you to [10] address them, because it's a different situation [11] now.

[12] **MR. COFFMAN:** Yes, sir.

[13] **THE COURT:** He's no longer categorized for [14] this purpose as a career offender because this is [15] not, this is not a crime of violence to a drug [16] offense. Now—

[17] **MR. COFFMAN:** Yes, sir.

[18] **THE COURT:** So the Court tentatively finds [19] that base at this level is the 12. He has six [20] criminal history points resulting in a criminal [21] history category three. The resulting guideline is [22] a range of 15 to 21 months, fine range of 3,000 to [23] 30,000, supervised release range of two to three [24] years. I'll hear you.

[25] **MR. COFFMAN:** Your Honor, as of this date

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 93-5075/76

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

BUD RIGGINS; DONALD MCVEAN,
Defendants-Appellees.

FILED
APR 6 1994
LEONARD GREEN, Clerk

ORDER

BEFORE: GUY and SILER, Circuit Judges; and CHURCHILL,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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*Hon. James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

(2)

Supreme Court, U.S.
FILED
AUG 8 1994
OFFICE OF THE CLERK

No. 94-31

In the Supreme Court of the United States

OCTOBER TERM, 1994

BUD RIGGINS AND DONALD MCVEAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing the order of the district court granting a judgment of acquittal following a jury verdict of guilty.

1. On March 2, 1992, petitioners were indicted by a grand jury sitting in the United States District Court for the Western District of Kentucky. They were charged with controlled substances and firearm offenses. Following a jury trial, petitioners were found guilty of conspiring and attempting to manufacture 3, 4-methylenedioxyamphetamine, in violation of 21 U.S.C. 846, and possession of triple-neck round-bottom flasks with intent to manufacture 3, 4-methylenedioxyamphetamine, in violation of 21 U.S.C. 843(a)(6).

On December 11, 1992, the trial court granted a post-verdict judgment of acquittal on the three controlled substances offenses. Pet. App. 20a-21a.[1] The court concluded that the proof was insufficient to prove guilt beyond a reasonable doubt.

2. The court of appeals reversed. Pet. App. 1a-19a. The court held that, taken in the light most favorable to the government, the evidence was sufficient for a reasonable jury to find petitioners guilty beyond a reasonable doubt.

3. Petitioners contend (Pet. 17-30) that the evidence was insufficient to support their convictions. They argue that the court of appeals did not require that the jury verdict be supported by substantial evidence (Pet. 17-22); that it allowed questionable inferences to support the verdict (Pet. 22-27); and that it adopted the citations in the government's brief without any critical analysis (Pet. 28-30).

Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision is not a final judgment against petitioners. After imposition of sentences by the district court, petitioners can again take an appeal to the court of appeals raising any issues that may be available to them, including any possible trial errors, and preserving the claims they have raised in their present petition. If the court of appeals affirms the final judgments against them, petitioners will then be able to present their current contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari. Accordingly, review by this Court of the

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[1] The court did not disturb the conviction of petitioner McVean for possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1).

court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

AUGUST 1994

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[2] Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.